88-729 ①

Supreme Court, U.S.
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No. ________

In The

Supreme Court of the United States

October Term, 1988

ROBERT ROWE, ET. AL.,
Petitioners,
v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN, ET. AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the lower court erred in refusing to find that Allied and Armco unlawfully unilaterally amended the Plan in effect between Allied and the Oil, Chemical and Atomic Workers International Union and its Local No. 3-523 ("OCAW").

II. Whether it was arbitrary, capricious, in bad faith, erroneous as a matter of law, or unsupported by substantial evidence for the Trustees to conclude that a "lay-off" required employees to suffer a period of unemployment.

III. Whether the district court and the court of appeals should have given *de novo* review in this matter as opposed to utilizing the "arbitrary and capricious" standard of review.

IV. Whether the Respondents violated 29 U.S.C. § 1058 by failing to transfer assets sufficient to fund certain employees' early retirement benefits.

V. Whether the Trustees owed a fiduciary duty to the Social Security Petitioners and whether that duty was breached.

VI. Whether certain Petitioners had standing to sue for breach of a fiduciary duty.

PARTIES TO THE PROCEEDING

The Petitioners in this proceeding comprise of the same group of plaintiffs/appellants in the courts below. The Petitioners consist of the following individuals and entities:

Oil, Chemical and Atomic Workers International Union, AFL-CIO, Oil, Chemical and Atomic Workers Local Union 3-523, Dan Abrams, Jr., Fred L. Archey, Clarence Arrowood, Donald Ball, Robert L. Beloat, Charles W. Campbell, Earl Castle, Kenneth R. Coburn, Ted Cordle, Robert E. Damron, Charles C. Diamond, Eugene S. Duncan, Lancan J. Everman, Bob O. Foster, James C. Fuller, Jr., Glenn Edward Gilbert, L.R. Greene, Charles E. Howard, Joseph M. Ketchesin, James H. Leake, Stanley Lee Leake, Charles J. Phillips, Robert L. Phillips, Wade F. Rigsby, Jack C. Roark, Carl T. Robinson, Robert Rowe, A.W. Snoddy, Elmer Thompson, Jack C. VanHoose, Nelson E. Walker, Bobby Gene Watts, Charles F. Wechsler, Allen J. Conley, William Simmons, John L. Barber, Ishmael R. Brewer, Charles E. Church, Claude Dennison, John D. Griswold, James A. Hayes, Charles Norman King, James C. Kretzer, Everett Lemaster, Jr., Kenneth E. Leibee, Mitchell McCalvin, Paul C. Preston, Paul B. Price, Ersel Salyers, Byron Steele, Jr., Robert L. Thornbury, George E. Walton, Jr., Clifford Brickey, Clifford Eaton, Gene Gabbard, Jesse Hill, John C. Hite, Everett Kiser, George Lester, Herman McKenzie, Donald Richardson, Carl Stapleton, Chester Watson, Jethroe Bowling, Hank C. Conley, Herman Conley, Ralph Fain, Robert L. Garlock, Allen Hogue, Jr., Willy Hughes, Estill V. Martin, Hubert Neace, Floyd M. Penix, James L. Porter, James O. Potter, Curtis E. Puckett, Sheridan E. Sprague, James E. Stambaugh, Earl Wheeler, James N. Yates.

The Respondents are the Allied Chemical Hourly Employees' Pension Plan, Allied Corporation, Armco Inc. Pension Agreement Plan and Armco Inc.

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The opinion of the Court of Appeals (App. 1a-12a) is unreported since it was not recommended for full-text publication pursuant to Sixth Circuit Rule 24. Neither of the District Courts' Memoranda Opinion and Order are reported, although each is contained in the separate appendix to this Petition at pages 13a and 31a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 22, 1988. No petitions for rehearing were filed in this matter. Further, no orders granting extensions of time within which to petition for certiorari have been entered by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This action generally involves the Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001, *et. seq.* Specifically the following sections of ERISA and other statues relied upon are set out verbatim as follows:

29 U.S.C. § 185:

> **Suits by and against labor organizations**
>
> **(a) Venue, amount and citizenship**
>
> Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 1002(7):

Definitions

. . .

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1058:

Mergers and Consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multi employer plan to which subchapter III of this chapter applies.

29 U.S.C. § 1104:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d) (3) of this title), the diversification requirement of paragraph (1) (C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1) (B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d) (4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to

be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1132:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

STATEMENT OF THE CASE

Until December 31, 1981, Allied Chemical Company ("Allied") owned and operated a coke-producing facility in Ashland, Kentucky. The hourly employees at the facility were represented by the OCAW pursuant to successive collective bargaining agreements between Allied and the OCAW. Pension benefits for Allied's employees, including the individual Petitioners, at the facility, were governed by the Allied Plan, which was a collectively bargained agreement whose terms were negotiated by OCAW and Allied separately from the collective bargaining agreement. Pursuant to a Letter Agreement of May 12, 1981, the Allied Plan went into effect on that date and had an expiration date of October 21, 1986. The Plan, itself, and the Letter Agreement implementing the Plan provide that benefits specified under the Plan may not be changed or terminated without the agreement of the OCAW.

In general, three provisions of the plan are involved in this appeal. The Allied Plan contains an "80-point" provision in Article IV(2) (a), which permits early retirement when the sum of an employee's age and length of service with Allied is 80 or more. The Plan also contains a provision describing the computation of credited service with Allied for the purpose of determining 80-point pension eligibility for employees who are laid off. This provision reads, in part:

> If an employee is laid off for any reason within three years of the date that he would be eligible to retire under Article IV(2) (a) hereof, he will receive credit for the period of layoff from the effective date up to the date his age and years of credited service, including such period of layoff, equals [sic] 80.

Article IX(4) (a).

The Allied Plan also includes a Social Security "leveling provision," which is available to employees who retire before becoming eligible for Social Security. In essence, Article VII provides that an employee may elect to receive larger monthly payments if he retires before becoming eligible to receive Social

Security, in lieu of the retirement income otherwise payable upon early retirement. Such larger monthly payments will be paid until the day he becomes eligible to receive Social Security payments, after which time his monthly payments will be reduced by the amount of the Social Security benefit.

This case involves the OCAW members' entitlement to various benefits following the sale of Allied's Ashland Coke Plant to Armco, Inc. (''Armco'') and a transfer of certain pension assets from the Allied Plan to the Armco Pension Plan in accordance with a sales agreement entered into between Allied and Armco with an effective date of December 31, 1981. Although OCAW met with Allied representatives on several occasions during the month preceding the sale date, the OCAW never agreed to any changes to the Allied Plan. In fact, the sale raised tensions between the OCAW and the various parties to the sale, including a new character in the sale, the United Steelworkers of America, which union, in effect, unlawfully ''took over'' representation of the OCAW members after the sale. The recent denial of a separate Petition for Writ of Certiorari filed by, among others, the Steelworkers left standing a decision of the Sixth Circuit Court of Appeals that the OCAW continued to be the exclusive bargaining agent of those employees of the sold coke plant after the sale date.

The Petitioners in this action have been, throughout the litigation, categorized into three groups. Group 1 Petitioners consist of those individuals who were within three years of reaching eligibility for an 80-point pension at the time of the sale and who accepted employment with Armco. Each Group 1 Petitioner applied for an Allied 80-point pension under Article IX(4) (a) of the Allied Plan. Allied denied the pension application of each Group 1 Petitioner.

Group 2 Petitioners consist of those individuals eligible for 80-point retirement on or before the date of the sale but who accepted employment with Armco without, as of the time of the sale, retiring from Allied. On or about December 1, 1984, each Group 2 Petitioner applied for an 80-point pension under the terms of Article IV(2) (a) of the Allied Plan and each was denied their pension applications in January of 1985.

Petitioners who retired from Allied on or before the sale date, foregoing employment with Armco, and receiving the aforementioned Social Security option, consist of Group 3 Petitioners. The OCAW was also a Plaintiff below and is also a Petitioner herein.

Counts I and III of the Complaint apply to Groups 1 and 2, respectively. Both counts represent claims brought under § 1132 of ERISA, 29 U.S.C. § 1132, for wrongful denial of benefits under the Allied Plan. Each count also alleges that the failure of the Allied Plan and Allied, itself, as Plan Administrator, to pay such benefits constitutes a breach of fiduciary duties in violation of 29 U.S.C. § 1104.

Counts II and IV asserts statutory violations of ERISA pursuant to 29 U.S.C. § 1058. Count II alleges that by failing to transfer assets to the Armco Plan sufficient to pay Group 1 80-point pensions, Allied and its Plan violated the referenced section and their fiduciary duties, as well. Count IV alleges that the transfer resulted in a diminution of the benefits to which Group 1 and 2 Petitioners were entitled in violation of § 1058.

Count V alleges that Allied and/or its Plan wrongfully induced Group 3 Petitioners to retire and that the same constituted willful or negligent representation in violation of the Allied Plan, fiduciary duties of § 1104 and, common law duties. Count VA alleges that the failure of Armco to inform Allied or the Group 3 Petitioners of their intention to furnish the Social Security option constituted willful or negligent misrepresentation and that such conduct was a breach of fiduciary duties of the Armco Plan in violation of § 1104.

Count VI is brought under the Labor Management Relations Act, 29 U.S.C. § 185, and alleges that, by violating the provisions of the Allied Plan, Allied breached its collective bargaining agreement with the OCAW.

Federal jurisdiction in the court of first instance is based upon 29 U.S.C. § 1132, 29 U.S.C. § 185(a) and 28 U.S.C. §§ 1332 and 1337.

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ in this matter for several reasons which will be explained in more detail below. The Court of Appeals entered an Opinion which is in conflict with the decisions of other Federal Courts of Appeal. Further, the lower court Opinion departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court so as to warrant an exercise of this Court's power of supervision.

I. THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE ALLIED RESPONDENTS UNILATERALLY AMENDED THE ALLIED PLAN, RESULTING IN A BREACH OF THE COLLECTIVE BARGAINING AGREEMENT AND OF THEIR FIDUCIARY DUTIES.

By affirming the decision of the District Court to deny the 80-point pension to the Group 1 and 2 Petitioners, the Court of Appeals, in essence, sanctioned unlawful activity to the serious detriment of the Petitioners. Group 1 and Group 2 Petitioners applied to Allied for the retirement due each such Petitioner under the 80-point pension program. The Group 1 Petitioners suffered a layoff when they ceased working for Allied resulting in their qualification for the 80-point pension given their years of service and age at that time. The Group 2 Plaintiffs were eligible for the 80-point pension at the time of the sale transaction. It was, therefore, unlawful for Allied to reject their applications for this benefit.

The provisions of the Plan provide the Group 1 and 2 employees with an unconditional right to retire from Allied with an immediate 80-point pension, even if they accept employment with another employer. Nevertheless, Allied gave the Group 2 Petitioners at the time of the sale a choice between an immediate pension from Allied or employment from Armco.

This characterization by Allied of the choices to the Group 2 Petitioners acted as an amendment to the Allied Plan in violation of both the collective bargaining agreement and the fiduciary duties of the Administrator of the Plan, Allied Chemical. As mentioned above, the collective bargaining agreement and pension document unequivocally provide that the OCAW must agree to any modification of the Plan. The actions taken by Allied in its sales transaction, a separate and exclusive arrangement from the relationship between the OCAW and Allied, which modify the Group 1 and Group 2 Petitioners' rights under the Allied Plan, result in a breach of that agreement.

At the time of the sale each Group 1 Petitioner was within three years of his age and service credit being equal to 80. The Group 2 Petitioners had the unconditional right to retire from Allied even before the sale. Whatever private agreement Allied entered into with Armco concerning the rights of the Allied Plan participants may have been enforceable between Allied and Armco but clearly is unenforceable as to the OCAW and its members given the provision requiring the OCAW's agreement with any changes and the requirement that any changes be ratified.

The OCAW's constitution requires ratification of agreements before any agreement comes into being. Thus, in *Lear Siegler v. International Union, U.A.A. and A.I.W.*, 419 F.2d 534, 535 (6th Cir. 1969), the Sixth Circuit Court of Appeals, itself, held that:

> [a] negotiating team, unless given the power to bind its principal, usually reports the proposed agreement to the union membership which may ratify or reject the pact. The method of ratification, unless otherwise stipulated by the parties, is an internal concern of the union. . . . Until it ratifies the agreement and executes the final instrument *the contract does not become operative.*

Citations omitted, emphasis added.

The question of whether to accept amendments to the Allied Plan was never presented to or ratified by the employees of Local 3-523 of the OCAW. Thus, no agreement to amend the Allied Plan written or otherwise, could modify the Group 1 and

2 Petitioners' pension rights. Allied's actions in entering into an agreement with a third party to the collective bargaining agreement and pension plan to modify the rights of participants results in a breach of fiduciary duty by Allied pursuant to 29 U.S.C. § 1104. Further, such actions resulted in a breach of the collective bargaining agreement by Allied pursuant to 29 U.S.C. § 185(a). Nonetheless, the Court of Appeals in its decision below accepted that Allied and Armco could amend the plan. The lower courts affirmed the theory that the Group 2 Petitioners were faced with a choice to either retire or accept employment with Armco, but not both.

The Court of Appeals' decision departs greatly from the accepted and usual course of proceedings warranting this Court's reviewing this matter. Otherwise, parties to a collective bargaining agreement, particularly labor organizations, will never feel confident that their binding agreement with the employer, who happens to be the administrator of a trust fund, will not be cast aside at the whim of the employer/administrator to the betterment of the employer in its transaction. This policy cannot be allowed to stand as it disrupts any confidence labor organizations, in particular, feel in having a collective bargaining agreement setting forth single employer pension plans.

II. THE LOWER COURT'S DECISION THAT THE EMPLOYEES DID NOT SUFFER A LAYOFF, AS THE TERM IS UTILIZED IN THE PLAN, IS BOTH IN CONFLICT WITH OTHER COURTS OF APPEALS DECISIONS AND IMPROPERLY ADDS TERMS TO THE AGREEMENT TO THE DETRIMENT OF THE PARTICIPANTS.

Even though the employees of Allied ceased working for Allied on the day before the sale and began working for a wholly separate employer after the sale, at different wage rates and representation by a different labor organization, the United Steelworkers, the lower court found arbitrarily that, merely because the employees suffered no break in service, the layoff provision in the Allied Plan was not triggered. This decision conflicts with well reasoned authority from other Federal Courts of Appeals facing substantially similar situations and also goes well beyond the accepted and usual course of judicial decision making.

That the Group 1 Petitioners suffered no period of actual unemployment following their separation from Allied employment is simply immaterial. Article IX(4) (a) of the Allied Plan credits Allied employees laid off within three years of attaining an 80-point pension with remaining service necessary for a pension. A separation from Allied employment ''for any reason'' triggers the right to accrual of layoff pension under said Article. The only precondition in the Plan triggering continuation of an Allied Pension credit under Article IX(4) (a) upon separation from Allied employment is interruption of Allied Pension credits. However, this interruption is in no way dependant upon any period of unemployment. The Group 1 and Group 2 Petitioners suffered a break in Allied Pension credit, and according to the clear language of the Plan, were laid off within the meaning of Article IX(4) (a) of the Allied Plan, even though they were immediately hired by Armco.

The lower court characterized the interpretation of the term ''lay off'' as a reasonable interpretation not arbitrary or capricious. Since the decision violates clear language of the Plan, the administrator's decision should have been overturned without an analysis of whether that decision was arbitrary or capricious. The case law relied upon by the lower court in determining that the interpretation of the term lay off requires some period of unemployment is inapplicable. In both *Jung v. F.M.C. Corp.*, 755 F.2d 708 (9th Cir. 1985) and *Pabst Brewing Co. v. Anger*, 610 F.Supp. 214 (D. Minn. 1985), *aff'd.* 784 F.2d 338 (8th Cir. 1986), each court was interpreting the termination language in connection with whether employees were eligible for severance benefits. Not only do the two cases relied upon by the lower courts not involve language even remotely similar to the language presented herein concerning layoff in a 80-point pension early retirement setting, but the considerations involved in whether to pay severance benefits are separate and distinct from the situation before the Court. Indeed, the decisions relied upon by the Sixth Circuit expressly find that severance benefits are payable to help during a period of unemployment, thus bolstering the requirement that there be a period of unemployment. No such consideration is involved in whether an employee receives 80-point pension.

The Plan contains no requirement that there be any period of unemployment. Indeed, both the lower court and the Respondents acknowledged this fact when each suggests that the Group 2 Petitioners should have retired while working for Allied and then filed an application with Armco for employment. The employee following this suggestion could receive the pension and suffer no break in severence. The arbitrariness of such a distinction is obvious. It is arbitrary to state that two employees should be treated differently when one retired the day before the sale and applied with Armco to start the day after the sale when the other would be denied his early retirement merely because he did not fill out the application. In any event, according to the Plan, itself, the triggering event is not the filing of the application for benefits, but the layoff. Both employees who had to suffer a layoff, should be treated similarly and receive benefits.

The Sixth Circuit's decision is in conflict with other circuits which hold that it is arbitrary and capricious to require a period of unemployment before benefits can be paid. The Sixth Circuit's decision conflicts with *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985) and *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (8th Cir. 1985).

The Petitioners urge this Court to grant the Writ of Certiorari in this matter in order to resolve the conflict created by the Sixth Circuit. The Writ is also properly granted since the Sixth Circuit's decision, in its arbitrariness and unreasonableness, calls for this Court's review.

III. THE STANDARD OF REVIEW FACED BY PETITIONERS BELOW WAS IMPROPERLY DEFINED AND IN CONFLICT WITH DECISIONS OF OTHER FEDERAL

COURTS OF APPEALS REQUIRING DE NOVO REVIEW WHEN A PLAN ADMINISTRATOR HAS FINANCIAL INTEREST IN THE OUTCOME OF A DECISION.

Unquestionably Allied Chemical, the Plan Administrator of the Allied Plan, had a great financial interest in the outcome of its transaction to sell the Coke Plant in Ashland, Kentucky to Armco. The disposition of issues surrounding the pension plan could have been a stumbling block if a resolution was not reached between the parties to that transaction. Notwithstanding that any amendments to the plan should have been agreed to and ratified by the OCAW and it's Local's membership, Allied completed its transaction and transferred funds out of the Allied Plan without a formal amendment to the Plan.

Where a plan administrator has a financial interest in the outcome of the transaction or interpretation or construction of a plan, further review and interpretation of the plan is subject to *de novo* review by the district court and by the appellate court. *Haeffele v. Hercules Inc.*, 839 F.2d 952 (3rd Cir. 1988); *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985). The Sixth Circuit's decision to utilize only the arbitrary and capricious standard of review, which gives great defference to the plan administrator, is in conflict with these decisions of other courts of appeals. The Court should grant the Writ to resolve this conflict.

The lower court used a narrow arbitrary and capricious standard, in any event. The standard of pure "arbitrary and capricious" has been held by the Sixth Circuit to apply to decisions involving the denial of benefits. *See Addcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623 (6th Cir. 1987). However, the Sixth Circuit, itself, has recognized that a broader standard can be utilized depending on the circumstances of the case. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985). In *Blakeman* the Court found the correct standard of review to be whether a decision was arbitrary, capricious, in bad faith, erroneous as a matter of law, or unsupported by substantial evidence. *Ibid.* at 1149. Thus, where the Sixth Circuit utilizes only the arbitrary and capricious standard to instances where the administrators rendered a decision erroneous as a matter of law or unsupported by evidence, the Sixth Circuit defied its own precedent by not overturning the plan administrator's decision.

Whether the Allied Respondents breached their fiduciary duties under 29 U.S.C. § 1104 and whether the Allied Respondents' conduct in failing to transfer sufficient assets to the Armco Plan, as discussed below, constituted further statutory violations under ERISA are issues separate and apart from the benefit denial standard utilized by the lower court. Granting the Writ of Certiorari will allow this Court to correct this serious deviation from the accepted and usual course of judicial proceedings and reason.

In fact, even the Trustees of the Allied Plan do not have final authority to interpret pension eligibility under the Plan, itself. Under Article XII of the Allied Plan if a pension applicant disputes an interpretation concerning his eligibility, the dispute is subject to final and binding arbitration by a neutral third party subject to the interpretation of *de novo* review. The Allied Respondents have repudiated their obligation to arbitrate disputes concerning pension eligibility concerning the Group 1 and 2 Petitioners. The lower court, therefore, ignored this clear language in the Plan leaving, once again, a decision dangerous to individuals dealing with pension plans.

IV. SINCE THE GROUP 1 AND 2 PETITIONERS' 80-POINT PENSIONS ARE NONFORFEITABLE ACCRUED BENEFITS PROTECTED UNDER ERISA, THE ALLIED RESPONDENTS VIOLATED 29 U.S.C. § 1058 BY FAILING TO TRANSFER SUFFICIENT ASSETS TO THE ARMCO PLAN.

Decisions from several circuit courts hold that funded, unreduced, early retirement benefits such as the Group 1 and Group 2 Petitioners' 80-point pensions are nonforfeitable accrued benefits protected under ERISA. *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2nd Cir. 1985); *Hoover v. Cumberland, Maryland Teamsters Pension Fund*, 756 F.2d 977 (3rd Cir. 1985); *Shaw v. International Association of M. & A.W. Pension Plan*, 750 F.2d 1458 (9th Cir. 1985). Indeed, because each Group 1 and 2 Petitioners' 80-point pension would survive pre-retirement termination of employment, each such pension was a vested nonforfeitable right. *See Nachman v. Pension Benefit Guarantee Corp.*, 446 U.S. 359 (1980).

The Court of Appeals below committed a gross oversight in the facts of this case when it concluded that the Group 2 Petitioners were entitled to an 80-point pension under the Armco Plan and would receive the same benefits as they would have received if they had remained at Allied. In fact, under Article XIV of the Allied Plan, the Group 2 Petitioners had an indefeasible right to an immediate 80-point pension before the Allied Respondents in essence, amended the plan to alter the employees' benefits. The condition that Group 2 Petitioners forfeit the immediate Allied 80-point pensions to obtain alleged "guaranteed" Armco employment is void. What in fact occurred is that Armco credited Group 2 Petitioners under the Armco Plan with their Allied years of service allowing the Group 2 Petitioners to commence benefits only upon retiring from Armco employment. In essence, therefore, the circumstance faced by the Group 2 employees with Armco was radically different from their immediate right to the 80-point pension before the sale. Thus, the lower courts committed blatant factual oversights which must be rectified.

The Group 1 Petitioners were, as discussed above, laid off within three years of being eligible for an 80-point pension. The Plan, therefore, dictated that each such employee had an nonforfeitable right to an 80-point pension once his years of credited service with Allied (already sufficient) and his age equaled 80. This right was vested and nonforfeitable.

Given that the Group 1 and Group 2 Petitioners held vested, nonforfeitable rights, the lower court committed serious error in not determining that the Allied Respondents violated 29 U.S.C. § 1058 by carrying out a transaction which resulted in a reduction of benefits to these individuals. Given the dearth of decisions interpreting § 1058, it is appropriate that this Court exercise its power of review to analyze the application of this section of ERISA.

V. ASSUMING THE GROUP 3 PETITIONERS' SOCIAL SECURITY OPTIONS ARE NOT NONFORFEITABLE ACCRUED BENEFITS PROTECTED UNDER ERISA, THE LOWER COURT ERRED IN FINDING THAT THE ALLIED RESPONDENTS DID NOT OWE THE GROUP 3 PETITIONERS FIDUCIARY DUTIES UNDER ERISA, WHICH DUTIES THEY BREACHED, AND IN FINDING THAT ARMCO IMPROPERLY AMENDED THE TERMS OF THE PLAN.

Assuming *arguendo*, that the Allied Respondents owed the Group 3 Petitioners no duty to maintain their Social Security options under the Allied Plan, the Allied Respondents continue to owe the Group 3 Petitioners other fiduciary duties, among them, the duty to advise accurately regarding the right to a Social Security option under the Armco Plan after the sale. Such being the case, the lower court erred when it concluded that the Allied Respondents owed the Group 3 Petitioners no fiduciary duties under ERISA.

Even though the Group 3 Petitioners did, in fact, exercise their option to receive the retirement income, these individuals continue to have a dispute with Allied. The Group 3 Petitioners claim that the Allied Respondents induced these employees to retire from Allied and forego Armco employment by misrepresenting to them that their Social Security options would not be available if they accepted Armco employment. The Allied Respondents violated 29 U.S.C. § 1104 by, among other things, failing to heed the prohibition against amending the Group 3 employees' rights without OCAW's agreement. In essence, the Group 3 Petitioners never should have been faced with that choice inasmuch as the OCAW never agreed to the amendment to the Plan. The lower court, therefore, committed error departing greatly from accepted judicial proceedings warranting this Court's review.

VI. THIS COURT SHOULD REVIEW THE LOWER COURTS DECISION TO STRIP THE GROUP 3 PETITONERS AND THE OCAW OF THEIR RIGHT TO CHALLENGE ARMCO'S ACTION.

The Group 3 Petitioners properly can be viewed as participants with respect to the Armco Plan. The plain language of 29 U.S.C. § 1002(7), defining a "participant," includes members or former members of an employee organization. Here, Armco agreed to preserve the Group 3 Petitioners' options by contract and accepted assets from Allied for that purpose. In this case, before and at the time of the sale, the Group 3 Petitioners were members of the OCAW, an employee organization, and they were eligible to receive benefits under the Armco Plan. Thus, Armco's actions resulted in its failure to ensure that those employees knew they had rights under the Armco Plan.

Since Armco accepted benefit liabilities for the Group 3 Petitioners and assets from Allied for these individuals, the Sixth Circuit does have subject matter jurisdiction over Armco's actions and should not have dismissed the Group 3 Petitioners' action against Armco for breach cf its fiduciary duty to them.

The OCAW was also wrongfully dismissed in this action warranting review of the Sixth Circuit's decision in part on a theory which has not been addressed by this Court and which warrants the granting of the Writ. The District Court ruled that the six month statute of limitations set forth in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), was applicable to the OCAW's case pursuant to 29 U.S.C. § 185(a). It was improper for the Sixth Circuit to utilize the *DelCostello* duty of fair representation/§ 185 hybrid statute of limitations action to the instant action brought by the OCAW and other Petitioners against Allied. Petitioners "breach of the collective bargaining agreements" claim is not a hybrid duty of fair representation action. The OCAW, itself, claims to be an injured party and is suing on behalf of its members for breach of contract. Thus, the action would be better governed by a five-year statute of limitations and not the six year hybrid statute applicable in *DelCostello*. This Court has not had occasion to address a circumstance similar to that presented herein where a non-hybrid action pursuant to § 185 is brought by a labor organization. Therefore, it would be appropriate for the Court to grant the Writ to resolve this important dispute as to whether the OCAW is, in fact, barred from bringing the action.

CONCLUSION

The Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted:

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(2)

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ________

IN THE
Supreme Court of the United States
October Term, 1988

ROBERT ROWE, ET. AL.,
Petitioners,
v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN, ET. AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. **This notice is to be *prominently* displayed if this decision is reproduced.**

NOT FOR PUBLICATION

NO. 87-5480
DECIDED AUGUST 16, 1988
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT ROWE, ET AL.,

Plaintiffs-Appellants,

v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: LIVELY, KRUPANSKY and BOGGS, Circuit Judges.

PER CURIAM. Plaintiffs, the Oil, Chemical and Atomic Workers International Union ("OCAW"), its Local 3-523 and some eighty OCAW members, appeal the district court's decisions granting summary judgment in favor of the defendants, Allied Corporation (Allied), the Allied Chemical Hourly Employees' Pension Plan (Allied Plan), Armco, Inc. (Armco), and the Armco, Inc. Pension Plan (Armco Plan). This case involves the OCAW member's entitlement to various pension benefits, following the sale of Allied's Ashland coke plant to

Armco and the transfer of pension assets from the Allied Plan to the Armco Plan in accordance with the sales agreement. After carefully reviewing the plaintiffs' contentions, we affirm the entry of summary judgment in favor of the defendants.

I

The facts are largely undisputed. The Allied Plan is a collectively bargained pension plan covering allied workers who are represented by the OCAW. Three provisions are involved in this case. The allied Plan contains an "80-point" provision in Article IV(2) (a), which permits early retirement when the sum of an employee's age and length of service with Allied is 80 or more. The Plan also contains a provision describing the computation of credited service with Allied for the purpose of determining 80-point pension eligibility for employees who are laid off:

> If an employee is laid off for any reason within three years of the date that he would be eligible to retire under Article IV(2) (a hereof, he will receive credit for the period of layoff from the effective date up to the date his age and years of credited service, including such period of layoff, equals 80.

Article IX(4) (a). Finally, the Allied Plan includes a Social Security "leveling provision," which is available to employees who retire before becoming eligible for Social Security. This provision provides for an optional method of leveling a pensioner's income throughout the retirement years by taking into account the pensioner's Social Security income. Article VII states:

> An employee retiring under the provisions of Article IV(2a) or (2c) hereof before he first becomes eligible to receive Social Security payments may elect to receive an actuarially equivalent retirement income providing larger monthly payments, in lieu of the retirement income otherwise payable upon early retirement, until the date he first becomes eligible to receive Social Security payments; thereafter, his monthly payments shall be reduced by the approximate amount of his monthly Social Security benefit. Insofar as practical, therefore, a level total retirement income will be available for the pensioner.

Under the terms of the sales agreement between Allied and Armco, Armco agreed to provide 80-point pensions under the Armco Plan to those Allied employees who were employed by Armco and who were eligible to receive the 80-point pension under the terms of the Allied Plan as of the closing date of sale (December 31, 1981). This special provision was made to accommodate these pensioners in the Armco Plan because that plan did not contain an 80-point benefit provision.

Allied also agreed to transfer to the Armco Plan assets equivalent to the actuarial value of the benefits earned by Allied employees as of the date of sale. For each employee for whom funds were transferred, Armco agreed to credit service under the Allied Plan for eligibility or vesting. Employees cold then elect benefits under the Armco Plan based on their entire length of Allied-Armco service, or they could elect the pension accrued with Allied as of the sale date, plus any benefits accrued with Armco subsequent to the sale. However, the Allied employees who were not hired by Armco or who chose to retire at the time of the sale continued to be covered solely under the Allied Plan.

Preceding the sale of the coke plant, Allied and OCAW representatives met on a number of occasions to discuss the impact of the sale. Allied advised employees who were eligible for an 80-point pension of their options under the sales agreement. In particular, they were told that the Armco plan did not contain a Social Security leveling provision equivalent to the one in the Allied Plan. If they wished to elect this option, they had to do so before they began working for Armco.

There are three groups of plaintiffs in this case:

Group 1 As of the sale date, the Group 1 plaintiffs were actively employed by allied. All were offered and accepted immediate employment with Armco. On the sale date, however, no Group 1 plaintiff was eligible to retire under the 80-point provision of the Allied Plan; all but one were within three years of reaching 80 points.

Under the sales agreement, Armco credited the Group 1 plaintiffs' Allied service under the Armco plan, and Allied transferred assets to the Armco Plan to cover that service. However, the Group 1 plaintiffs, since they had not attained 80 points when they accepted Armco employment, were not covered by Armco's agreement to provide the 80-point pension.

The Group 1 plaintiffs attained 80 points while working for Armco and thus applied for an Allied 80-point pension under Article IX(4) (a) of the Allied Plan. They claimed that the sale effected a layoff which entitled them to continuing service credit under Article (IX(4) (a). The Allied Plan denied the pension requests because these plaintiffs were no longer participants in the Allied Plan and were never laid off from Allied.

Group 2 These plaintiffs also accepted employment with Armco immediately following the sale, with no break in service. Unlike Group 1, however, these plaintiffs had reached 80 points at the time of the sale and thus were entitled to 80-point pensions under the sales agreement. Group 2 plaintiffs claim they should receive an 80-point pension under the allied Plan while continuing to work for Armco. The plaintiffs applied to the allied Plan, which denied the pension requests because they had not elected to retire while they were Allied employees and participants in the Allied Plan. Since provision had been made to pay the benefits under the Armco Plan, Group 2 plaintiffs need only retire under that Plan to receive the 80-point pension. The record indicates that several employees have already done so since this litigation commenced.

Group 3 These plaintiffs also had achieved 80 points when the sale took place. Unlike Group 2, however, these plaintiffs elected to retire from allied and are receiving 80-point pensions, including the social Security leveling option afforded under the Allied Plan. Group 3 plaintiffs contend they were wrongfully induced to retire by representations that the Social Security option would be unavailable if they accepted Armco employment and became participants in the Armco Plan. The undisputed facts show that the Armco Plan did not contain a Social Security leveling provision, and that all communications made by Armco representatives to allied representatives before the sale were that no Social Security option would be provided. Armco did not formulate and communicate a policy decision to provide the option until plaintiffs' counsel demanded the option on behalf of a former Allied employee, nearly a year after the sale.

Plaintiffs filed this suit, alleging a multitude of contentions. In Counts I and III, Group 1 and 2 plaintiffs alleged that the Allied defendants, by denying 80-point pensions under the Allied Plan, violated the Allied Plan and breached their fiduciary duties under section 404 of Employee Retirement Income Security Act of 1974 (''ERISA''), 29 U.S.C. section 1104. In Counts II and IV, these plaintiffs also alleged that the Allied defendants failed to transfer to the Armco Plan sufficient assets to pay their 80-point pensions, in violation of section 208 of that statute, 29 U.S.C. section 1058.

In Counts V and VA, the Group 3 plaintiffs alleged that the Allied and Armco defendants wrongfully induced them to retire by misrepresentations that a Social Security leveling option would not be available under the Armco Plan. These counts are based on section 404 of ERISA and common law duties. Finally, in Count VI, the plaintiffs alleged that the Allied defendants breached their agreement with OCAW to abide by the terms of the Allied Plan, thus violating section 301(a) of the Labor-Management Relations Act, 29 U.S.C. 185 (a).

The district court rejected all the plaintiffs' contentions. With respect to the first four counts, the district court concluded: 1) the Allied defendants' conduct in denying Group 1 and 2 plaintiffs 80-point pensions under the Allied Plan was neither arbitrary nor capricious; 2) the Allied defendants did not unilaterally amend the Allied Plan; 3) the transfer of assets from the Allied Plan to the Armco Plan did not violate section 208; that provision protects only accrued benefits, yet the early retirement benefits at issue were not accrued benefits; 4) the allied defendants did not breach their fiduciary duties under section 404; and 5) any state law claims were preempted by ERISA.

With respect to the remaining counts, the district court concluded: 1) the Allied defendants owed no fiduciary duty to the Group 3 plaintiffs because the Social Security option was not an accrued benefit; 2) the Allied defendants acted reasonably in relying on the Armco defendants' repeated assurances that Armco would not offer the option; 3) the Group 3 plaintiffs were not employed by Armco and could not be viewed as participants in the Armco Plan; the court thus lacked subject matter jurisdiction over their claims against the Armco defendants; and 4) the plaintiffs' section 301 breach of contract claim was barred by their failure to exhaust the contractual grievance procedures and by the six-month statute of limitations.

II

Plaintiffs argue that the district court erred in concluding that allied's denial of the 80-point pensions to Group 1 and 2 plaintiffs was based on a justifiable interpretation of the Allied Plan. The appropriate standard of review for decisions of plan administrators under ERISA "is whether the decision was arbitrary, capricious, or in bad faith." *Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987); *Varhola v. Doe*, 820 F.2d, 809, 812-13 (6th Cir. 1987). If the plan administrator's interpretation of a plan ambiguity is rational, courts should defer to the interpretation "in the interest of efficient pension administration." *Cook v. Pension Plan for Salaried Employees*, 801 F.2d 865, 871 (6th Cir. 1986).

The Group 1 plaintiffs contend that the sale of the coke plant resulted in a layoff, which entitled them to continuing service credit under Article IX(4) (a) of the Allied Plan. We rule, however, that it was not arbitrary or capricious to conclude that these plaintiffs, having suffered no break in employment, were not laid off within the meaning of Article IX(4) (a). Thus, the Group 1 plaintiffs were not eligible for the Allied 80-point benefit because they ceased to be Allied employees before they satisfied the preconditions for eligibility.

Article IX(4) (a) does not state that any separation from Allied employment triggers the layoff provision; it states only that a *layoff* triggers the provision. Yet, all the Group 1 employees went directly from Allied to Armco without a break in service, and each received credit under the Armco Plan for his year of service with Allied. Conversely, Allied employees who were on layoff status at the time of the plant sale and were not recalled to work by Armco did accrue service credit under Article IX(4) (a). The plan administrator's interpretation of "layoff" as requiring a period of unemployment is supported by case law. *See, e.g.*, *Jung v. FMC Corp.*, 755 F.2d 708, 712-13 (9th Cir. 1985); *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214 (D. Minn. 1985), *aff'd*, 784 F.2d 338 (8th Cir. 1986).

We also agree with the district court that it was not arbitrary or capricious to deny the Group 2 plaintiffs an 80-point pension because they did not retire under the Allied Plan while they were Allied employees and participants in that plan. Under Article IV(2) (a) and Article V[1], retirement from Allied is a prerequisite to receiving the 80-point pension under the allied Plan. It is undisputed that each Group 2 plaintiff was counseled by Allied representatives before the plant sale that he could retire from Allied and receive the 80-point pension, or go to work for Armco and receive the 80-point pension upon retirement from Armco. When these plaintiffs did not retire from Allied, the assets to fund their 80-point benefits were transferred from Allied to Armco.

If the Group 2 plaintiffs wanted the 80-point pension, yet still wanted to work for Armco, they could have retired from Allied and then sought employment with Armco. Instead, they chose guaranteed employment with Armco, at which point allied transferred assets to the Armco Plan for their pension. Thus, when these plaintiffs later sought benefits from Allied, the Allied defendants properly determined that plaintiffs had failed to retire while they were participants in the Allied Plan.

III

Next, plaintiffs content that the Allied defendants unilaterally amended the Allied Plan to eliminate the Group 1 and Group 2 plaintiffs' 80-point pensions, in violation of their fiduciary duties under section 404 of ERISA. The Allied defendants amended the

Plan, plaintiffs assert, by "imposing new conditions and/or a different interpretation on the Allied Plan's provisions."

This argument, however, is nothing more than a recasting of plaintiff's previous contention that the plan administrator's interpretation of the Allied Plan was arbitrary and capricious. As the Allied defendants correctly point out, the "alleged 'amendments' are really disputes over Plaintiffs' satisfaction of the pre-conditions for benefits described in the [Allied] Plan's terms." We have already concluded that the district court was correct in concluding that the plan administrator's interpretation of the Allied Plan was not arbitrary or capricious. The lower court also rules, correctly in our view, that the Allied defendants did not unilaterally amend the Allied Plan, as the plaintiffs contend. The defendants' interpretation of the Allied Plan, rather than amending the Plan in any respect, merely gave substance and effect to existing provisions. We find the plaintiff's section 404 claim to be without merit.

IV

Plaintiff's next contention is based on section 208 of ERISA:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. section 1058. They argue that the Allied defendants violated this provision by failing to transfer to the Armco Plan sufficient assets to pay the 80-point pensions to the Group 1 and Group 2 plaintiffs. We disagree.

Under section 208, we must compare the benefits an employee would receive before the transfer of assets (had the plan terminated) with the benefits he or she would receive after a transfer (had the new plan terminated). The Group 1 plaintiffs were not entitled to receive an 80-point pension immediately before the transfer because, as we discussed earlier, they had not satisfied the eligibility requirements of the Plan. Specifically, the sum of their age and service did not equal or exceed 80 on the sale date. Section 208 does not require the preservation of a benefit for which the plaintiffs were ineligible when the transfer occurred. Thus, the Allied defendants did not violate section 208 by failing to transfer sufficient assets to the Armco Plan to fund 80-point benefits for these plaintiffs.[2]

Plaintiffs claim on behalf of Group 2 plaintiffs is equally without merit. At the time of the transfer, these plaintiffs were entitled to receive under the Armco Plan the same benefits as they would have received if they had remained in the Allied Plan and that Plan had then terminated. *See Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 4 (6th Cir. 1988). The Group 2 plaintiffs were entitled to an 80-point pension under the Allied Plan before the transfer, and they are not entitled to an 80-point pension under the Armco Plan. The record is undisputed that Allied transferred assets to the Armco Plan to fund the 80-point pensions. Moreover, it was stipulated that several Group 2 plaintiffs who retired from Armco after this litigation commenced were receiving an 80-point benefit.

V

The Group 3 plaintiffs argue that the Allied defendants breached their fiduciary duties under section 404 of ERISA, by failing to advise them accurately regarding the availability of the Social Security leveling option under the Armco plan. They contend the Allied defendants wrongfully induced them to retire from Allied and forego Armco employment by misrepresenting to them that the option would not be available at Armco. We disagree.

We note at the outset that the plaintiffs do not claim that the Allied defendants haver terminated their contractual right to the option, inasmuch as they are currently receiving it. The Social Security option remains in the Allied Plan, has not been modified, and each Group 3 plaintiff who elected the option has had the benefit of the provision. Moreover, Allied was not under a fiduciary duty to maintain the option either directly or through Armco because the option was a contingent, early retirement, benefit which Allied was not required to maintain. *Sutton v. Weirton Steel Division*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). The legislative history of ERISA expressly mentions Social Security options as forfeitable and subject to amendment without implicating ERISA's fiduciary standards. H.R. Rep. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726. *See also* H.R. Conf. Rep. 1280, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054. It follows then that the Allied defendants did not have a fiduciary duty to provide information to these plaintiffs concerning the availability of the option in another employer's plan.

In any event, plaintiff's contention that the Allied defendants breached their fiduciary duty by not advising them accurately of their pension rights with Armco is without merit. There is no indication that Allied supplied false information, and it was reasonable for these defendants to rely on the repeated assurances of Armco that the Social Security option would not be provided under the Armco Plan. Ad Allied notes, "Armco's decision a year later [after the sale] to provide the option does not retroactively convert Allied's statements, which were true when made, into falsehoods." We also reject plaintiff's common law based claims, on the basis of the opinions below. The magistrate concluded, and the district court agreed, that Allied acted reasonable in relying on the repeated assurances of Armco that Armco would not offer the option. We agree with this conclusion and, therefore, do not address the possible preemption questions raised. *See Pilot Life Insurance Co. v. Dedeaux*, __ U.S. __, 107 S.Ct. 1549 (1987).

The Group 3 plaintiffs raise similar arguments against the Armco defendants; that is, that these defendants' failure to inform either Allied or the plaintiffs of their intention to furnish the Social Security option constituted misrepresentation in breach of ERISA fiduciary and common law duties.

The district court properly rejected this argument on jurisdictional grounds. ERISA establishes limits on who may sue for breach of fiduciary duties. "Although ERISA does mandate fiduciary duties with respect to employee benefit plans, such duties are solely with respect to participants." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986). The plaintiffs readily concede as much, when they say that "[t]he lower court was correct in its determination that it lacks subject matter jurisdiction over the Group 3 Plaintiffs' ERISA claims against Armco, if they are not or were not participants in the Armco Plan."

The Group 3 plaintiffs are not "participants" within the meaning of ERISA, 29 U.S.C. section 1002(7), because they were never employed by Armco, nor did they have any participation in the Armco Plan. *See Stanton*, 792 F.2d at 434-45; *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.), *cert. denied*, __ U.S. __, 107 S.Ct. 318 (1986). No contributions were ever made by Armco on their behalf. *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group*, 721 F.2d 654, 655 (9th Cir. 1983). The plaintiffs have received all the benefits they were entitled to under the Allied Plan, and they are now seeking only damages. "Because, if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits, they are not plan participants." *Kuntz*, 785 F.2d at 1411. Plaintiffs alleged merely the "breach off fiduciary duty or of a duty to disclose information about benefits, [and] thus any recoverable damages would not be benefits from the plan." *Ibid.*

Plaintiffs argue they qualify as "participants" because they are former members of an employee organization, OCAW, and they were eligible to receive benefits under the Armco Plan. To be sure, the definition of "participant" encompasses a "former member of an employee organization, who is eligible or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." 29 U.S.C. section 1002(7). Although plaintiffs say they were eligible to receive the Social Security option under the Armco Plan, the sales agreement accorded rights under that Plan only to former Allied employees whom

Armco hired. Moreover, the "may become eligible" language "applies only to current employees." *Freeman*, 721 F.2d at 655. *See also Stanton*, 792 F.2d at 432. The Group 3 plaintiffs were never employees of Armco, and therefore they are not "participants" within the meaning of ERISA. Accordingly, they may not sue Armco for breach of fiduciary duty. *Freeman*, 721 F.2d at 655. *See Coleman v. General Electric Co.*, 643 F. Supp. 1229, 1234-36 (E.D. Tenn 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987).[3] In any event, the Social Security option, as noted earlier, is not an accrued benefit under ERISA; it could be amended or even eliminated, and any decision in that respect would not be reviewable under ERISA's fiduciary standards. *See supra* at 13.

We have reviewed the remaining contentions and, finding them to be without merit, we AFFIRM the judgments of the district court.

MANDATE ISSUED: 8/16/88

COSTS TAXED: NONE

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[1] Article V states that "[a]n employee meeting the eligibility requirements of Article IV will be entitled to receive a pension each month beginning with the month following that in which his *retirement* takes place. . . ." (emphasis added).

[2] Plaintiffs do not contend that the Allied defendants failed to transfer sufficient assets to the Armco Plan to cover whatever benefits they were entitled to before the sale date under the Allied Plan.

[3] Because neither the magistrate nor the district court reached the merits of the common law claims, we decline to address these issues.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 83-282
DECIDED APRIL 1, 1987

ROBERT ROWE AND EUGENE S. DUNCAN, PLAINTIFFS

VS.

ALLIED CHEMICAL HOURLY EMPLOYEES
PENSION PLAN AND ALLIED CORPORATION, DEFENDANTS

and

CIVIL ACTION NO. 84-278

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, ET AL., PLAINTIFFS

VS.

ALLIED CORPORATION, ET AL.,
DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is presently before the Court upon cross-motions for summary judgment filed by the defendants Armco and Allied. The Court referred this matter to the United States Magistrate Joseph M. Hood for initial consideration and recommendation pursuant to 28 U.S.C. 636(b) (1) (B).

The Magistrate has filed his report and recommendation, in which he recommends granting the motions for summary judgment. These cross-motions for summary judgment pertain only to the Group 3 plaintiffs' claims in Counts V, VI, and VA of the First Amended Complaint. [Record #104]. The Group 3 plaintiffs [hereinafter referred to as the plaintiffs], Allied and Armco have filed objections to the report and recommendation. The

Court has considered the entire record. The Court will address the report and recommendation and the objections by discussing each of the three counts separately.

Count V: Allied's Negligent Misrepresentation

In this count, the plaintiffs claim that Allied has breached fiduciary duties owed to the plaintiffs by negligently misrepresenting the plaintiffs' pension rights. The plaintiffs contend that Allied's representation that the Social Security Option of Allied's Pension Plan would not be offered to the plaintiffs by Armco was a negligent misrepresentation because the representation was contrary to (1) rights the plaintiffs had rights under the Allied Plan; (2) to plaintiffs' rights under section 2.05(f) (iii) of the Sales Agreement between Allied and Armco; and (3) Armco's intention to offer the option to the plaintiffs.

In his report and recommendation, the Magistrate found that since this claim was brought under ERISA, 29 U.S.C. section 1104, for breach of fiduciary duty, the claim was not time-barred. The Magistrate correctly found that the applicable statue of limitations for this claim is 29 U.S.C. section 1113(a) of ERISA. The introductory language of this statue of limitations indicates that it applies to *all* actions under ERISA for breaches of fiduciary duties: "No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation [time limits omitted]. . ." The defendants have argued that a six-month statue of limitations like that applied to section 301 "hybrid" actions under the Labor Management Relations Act, 29 U.S.C. section 185, should be applied to Count V. The court is not persuaded by this argument.

The Magistrate has concluded that the social security option of the Allied Plan was not an "accrued benefit" and therefore the plaintiffs were not entitled to fiduciary duties with respect to the option. As authority for this determination, the Magistrate has cited *Sutton v. Weirton Steel Div.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *United Electrical Radio and Machine Workers of America v. Amcase Industrial Corp.*, 634 F.Supp. 1135, 1142 (S.D. Ohio 1986); and *McBarron* *v. S & T Industries, Inc.*, 771 F.2d 94, 99 (6th Cir. 1985).

The Court has considered the authorities cited and has found that the Magistrate's conclusion is amply supported. Like Allied's sale of the coke plant to Armco, in *Sutton*, 724 F.2d 406, National Steel Corporation sold one of its divisions to another corporation, and some of the division's employees sued National, National's Pension Plan, and the Independent Steel Workers Union. The suit arose from the fact that the sales agreement eliminated the early retirement benefits offered in the National Plan. The critical question was whether or not ERISA imposed any fiduciary duty to maintain the contingent, early retirement benefits which the plaintiffs had in the National Pension Plan. The Court held that National had no fiduciary duties under ERISA with respect to the contingent, early retirement benefits and stated:

> Under ERISA's vesting rules, only accrued benefits must be nonforfeitable. 29 U.S.C. section 1053(a). With respect to the issues raised by these appeals, ERISA defines an accrued benefit as an ''annual benefit commencing at normal retirement age.'' 29 U.S.C. section 1002(23). The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits. *See* H.R.Conf.R. No. 1280, 93d Cong., 2d Sess. 273, *reprinted in* 1974 U.S.Code Cong. & Ad. News 4639, 5038, 5054; H.R. Rep. No. 807, 93d Cong., 2d Sess. 60-61, *reprinted in* 1974 U.S. Cong. & Ad. News 4639, 4670, 4726. . . . An employer may change such benefits without violating ERISA. . .Any right to payment of benefits before normal retirement age must be found in pertinent employment agreements.

Sutton, 724 F.2d at 410.

Actually, the legislative history of ERISA answers the question at issue:

> [T]he accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits. . . .

H.R.Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code & Ad. News 4726; and H.Conf.Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5054.

The plaintiffs have vehemently objected to the Magistrate's analysis of Count V. They contend that benefits under ERISA need not be "accrued" for the plaintiffs to enjoy the protections of the Act and to be entitled to the fiduciary duties provided by the Act. They have cited *Amato v. Western Union International Inc.*, 773 F.2d 1402, 1415-16 (2d Cir. 1985), wherein the Second Circuit held that the plaintiffs had stated cognizable claims under ERISA and common law where the employer had modified the pension plan to decrease or eliminate certain *unreduced* early retirement benefits (i.e. *full* retirement benefits which were payable upon the employee's reaching a certain number of years of service or payable when the employee's age and years of service totalled eighty). *Id.* at 1420.

The Court has considered *Amato, supra*, and the plaintiff's arguments; however, the Court has determined that *Amato* is inapposite to disposition of the case at bar. As the Second Circuit stated, "Social security supplements which cease upon the employee's reaching normal retirement age. . .differ entirely from the unreduced retirement benefits to which an employee might become entitled under a retirement plan."

The Magistrate has also stated that the plaintiffs have failed to state a claim against Allied for common law misrepresentation. According to the plaintiff, the proper standard is set forth in the Restatement (Second) Torts, Section 552, which states in part:

> Section 552. Information Negligently Supplied for the Guidance of Others. (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to *exercise reasonable care or competence in obtaining or communicating the information.*

In applying this standard, the Magistrate concluded that the plaintiffs had justifiably relied upon the information supplied to them by Allied that Armco would not offer the social security option in choosing to retire from Allied rather than going to work for Armco. The Magistrate noted that since the information later proved to be false, the question is whether Allied failed to exercise "reasonable care. . .in obtaining. . .the information." The Magistrate considered the facts of the case and concluded that Allied acted reasonably in relying upon the repeated assurances of Armco that Armco would not offer the option.

The plaintiffs have objected to the Magistrate's findings. They argue that the Magistrate's conclusion is based upon the false premise that Allied was powerless to discover Armco's true intent concerning offering the option. It is unclear why the plaintiffs feel that the foregoing is a false premise. The Court can find no evidence which suggests Allied could have discovered Armco's decision to offer the option any earlier than Allied did.

Armco has objected to the Magistrate's statement that the plaintiffs justifiably relied upon Allied's statement that Armco would not offer the option. Armco contends that the record is devoid of evidence indicating that Armco's decision not to offer the option motivated the plaintiffs to retire from Allied. The Court has determined that at the very least the Magistrate's statement is a proper inference to be drawn from the undisputed facts surrounding the claims in Count V.

Additionally, Armco has objected to the Magistrate's statement that the information Allied supplied to the plaintiffs "later proved to be false." Armco seeks clarification of this statement.

The Court has considered the context of the statement and has determined that the Magistrate meant only to say that later Armco did in fact offer the option and not to imply that Armco had lied about its intent to offer the option.

Accordingly, the Court finds that the Magistrate properly concluded that the plaintiffs have no cause of action under ERISA against Allied in Count V..

Count VA: Armco's Breach of Fiduciary Duties and Negligent Misrepresentation

The plaintiffs have alleged that Armco's failure to inform either them or Allied of its intention to offer the option was misrepresentation in breach of Armco's fiduciary duties under ERISA and common law. In support of this allegation; the plaintiffs argue that by agreeing in principle and under the sales agreement to the preservation of pension rights, Armco conferred "unknowing" participant status upon the plaintiffs and thereby became a "constructive fiduciary."

The Magistrate did not find the plaintiffs' argument persuasive, and he noted that one must be a participant of a plan to file an action under ERISA according to 29 U.S.C. section 1132. The Magistrate stated that the plaintiffs could never be viewed as participants because they were not employed by Armco. *See Freeman v. Jacques Orthopaedic Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656 (5th Cir. 1980). As a result, the Magistrate concluded that this Court lacks subject matter jurisdiction under 29 U.S.C. section 1132.

The plaintiffs have objected to the Magistrate's findings as restated above. The plaintiffs argue that the Magistrate's conclusion is the result of a false premise that if the plan fiduciaries do not consider certain individuals to be participants, then they are not participants. This objection is wholly without merit. The premise behind the Magistrate's conclusion is that because the plaintiffs retired from Allied before ever working for Armco, they are not participants of Armco's plan.

Count VI: Allied's Breach of the Collective Bargaining Agreement

The Court begins its analysis of Count VI by stating that this count is inartfully plead.

Count VI provides:

> Plaintiffs reallege paragraphs 1 through 97 of the complaint. The Allied Plan governing the pension rights and benefits of coke plant employees is the product of collective bargaining by Allied and the OCAW. By violating the provisions of the Allied Plan in the manner set forth in the complaint, Allied breached its agreement with the OCAW to abide by the terms of the Plan. Allied is liable to the OCAW and its members for such breach.

[No. 104, p. 51].

To the extent that this breach of the collective bargaining claim concerns Counts 1-4, this Court stands by its earlier findings and conclusions stated in the preceding opinion [No. 131, Sept. 19, 1986]. To the extent Count VI concerns Counts V and VA, the Court stands on its conclusions stated in this opinion. Although the plaintiffs contend that Count VI is an ERISA-based claim, it is not. The plaintiffs do not have cause of action under ERISA with respect to the social security option because the option does not constitute "accrued benefits." [See *supra*, Count V discussion.

After consideration of the entire record, the Court has concluded that Count VI is section 301 claim under the Labor Management Relations Act, 29 U.S.C. section 185. The plaintiffs have ignored the reality that Count VI is a section 301 claim and have objected to the Magistrate's finding that this claim is anything other than an ERISA-based claim. The defendants have plead as an affirmative defense the plaintiffs' failure to exhaust the exclusive contractual grievance procedures and have argued that the section 301 claim is time-barred by the six-month statute of limitations applied by the Supreme Court to a hybrid section 301/fair representation action in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

The Court has concluded that Court VI, the plaintiff's claims for breach of the collective bargaining agreement, is barred by their failure to exhaust. The plaintiff employees have not alleged that they asked the OCAW to file a grievance on their behalf concerning Allied's breach of this term of the collective bargaining agreement. "Exhaustion of grievance and arbitration procedures [contained in the collective bargaining agreement] is a prerequisite to a section 301 action by an employee against an employer for breach of a labor contract." *Apponi*, slip. op. at 8, (6th Cir. Jan. 15, 1987).

Even if they did request the filing of a grievance, the employees did not file a breach of the duty of fair representation claim against the OCAW for not filing any grievance within six months of the breach.[1] As the defendants have stated, these allegations are essential to a section 301 claim by the plaintiffs. The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 186 (1967), held that an "employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached the duty of fair representation in the handling of the employee's grievance." But according to the plaintiff's cross motion of summary judgment, "no union member has claimed the union breached its duty of fair representation." [No. 65, p. 60, 7/10/85].

As a matter of fact, the plaintiffs contend that the Union itself is the party injured by Allied's breach of the collective bargaining agreement. *Id*. OCAW's claim of breach of the agreement is also barred by the Union's failure to exhaust the grievance and arbitration procedures of the agreement. *See e.g.*, *Apponi v. Sunshine Biscuits, Inc.*, Nos. 85-3782/3783, slip op. 8, (6th Cir. Jan. 15, 1987).[2] Additionally, this action was not filed within the six-month statue of limitations. *DelCostello*, 462 U.S. 151.

Accordingly, after consideration of the entire record and for the foregoing reasons,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

(1) That the Magistrate's report and recommendation is

approved and adopted as and for the opinion of the Court;

(2) That in conformity with the recommendation, the defendant Allied's motion for summary judgment is SUSTAINED, and the defendant Armco's motion for summary judgment is SUSTAINED;

(3) That this action is DISMISSED and shall be STRICKEN from the docket.

This 1 day of April, 1987.

Henry R. Wilhoit, Jr., Judge

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[1] The plaintiffs have stated, "[N]o union member has claimed the union breached its duty of fair representation. [No. 65. p. 60, 7/10/85].

[2] *Apponi, supra,* is distinguishable; the action at bar clearly implicates the union's duty of fair representation on a matter that was arbitrable under the agreement.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

Civil Action No. 83-282
Decided January 6, 1987
Robert Rowe And Eugene S. Duncan, Plaintiffs,

Vs.

Allied Chemical Hourly Employees
Pension Plan And Allied Corporation, Defendants.

And

Civil Action No. 84-278
Oil, Chemical And Atomic Workers
International Union, Et Al, Plaintiffs,

Vs.

Allied Corporation, Et Al, Defendants.

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter is presently before the undersigned for a report and recommendation upon the parties' cross-motions for summary judgment. 28 U.S.C. Section 636(b) (1) (B).

By Order dated September 18, 1986, the court granted partial summary judgment in this action dismissing the claims of the Group 1 and 2 plaintiffs.[1] The court reserved decision upon the claims of the Group 3 plaintiffs and the Oil, Chemical and Atomic Workers Union (OCAW) contained in Counts V, VA and VI of the first amended complaint.[2] It is those claims that the undersigned now addresses. The facts relevant to the instant dispute and greatly abbreviated are set out below.

On December 31, 1981 Armco, Inc. (Armco) purchased from Allied Corporation (Allied) a coke plant located in Ashland, Kentucky. Prior to the sale Allied and Armco representatives met on various occasions to discuss the terms of the sale including

Armco's intentions regarding the social security option contained in Section VII of the Allied Plan. It is undisputed that Armco informed Allied the Armco Pension Plan contained no such option and that none would be made available to Allied employees who chose to accept employment with Armco. Allied then "counseled" the Group 3 plaintiffs that should they choose to accept employment with Armco rather than retire under the Allied Plan they would lose their social security option as the Armco Plan contained no such provision. The Group 3 plaintiffs chose to retire. The instant dispute erupted when subsequent to the sale, Armco, contrary to its earlier assertions, made the social security option available to former Allied employees who went to work with Armco.

As such the Group 3 plaintiffs allege in Count V of the first amended complaint that Allied and/or its Plan wrongfully induced their retirement and that Allied's actions constituted willful or negligent misrepresentation in violation of the Allied Plan and fiduciary duties of section 404 of the Employment Retirement Security Act of 1974 (ERISA), 29 U.S.C. Section 1104, and common law duties. It is further alleged in Count VI that by violating the provisions of the Plan, Allied breached its collective bargaining agreement with the OCAW..

Further, based upon the above set forth facts, the Group 3 plaintiffs allege in Count VA that Armco's failure to inform either Allied or themselves of its intention to furnish the social security option constituted willful or negligent misrepresentation in breach of fiduciary duties of the Armco Plan in violation of Section 404 of ERISA, 29 U.S.C. Section 1104, and common law duties.

COUNT V

Allied first asserts that plaintiffs' claims contained in Count V are barred by the relevant statute of limitations. In this regard Allied argues for application of a six month period for suing such as is used in a "hybrid" suit for breach of the union's duty of fair representation and for breach of contract under section 301 of the Labor Management Relations Act, 29 U.S.C.. Section 185.

See DelCostello v. Teamsters, 462 U.S. 151 (1983). The six month period of limitations for the bringing of an action was recently rejected for actions brought under section 1132. *See, e.g.*, *Salyers v. Allied Corporation*, 642 F. Supp. 442 (E.D. Ky. 1986). Further, as the present action is one for relief from breach of fiduciary responsibility as set forth in section 1104, the relevant period of limitations is that contained in section 1113 of ERISA. *See* 29 U.S.C. Section 1113; *Knutz v. Reese*, 760 F.2d 926, 936-937 (9th Cir. 1985), *vacated on other grounds* 785 F.2d 1410 (9th Cir. 1986). As plaintiffs' claims were well within the limitation period set forth in section 1113, they are not now barred.[3]

The Allied defendants next seek summary judgment on the grounds the allegations of misrepresentation do not state a claim of ERISA violations. Their argument in this regard is that even assuming that Allied failed to provide information regarding the future availability of the social security option, ERISA does not require them to provide such information. Further, they argue the social security option is not in itself a pension benefit but merely an alternative form of payment of the 80 point early retirement benefit and as early retirement benefits are not "accrued benefits" they are not entitled to ERISA protection. *See, e.g.*, *Sutton v. Weirton Steel Div.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

Although ERISA provides a federal cause of action to consider allegations that a pension plan fiduciary has misrepresented a fact and/or quality of plan coverage, *Ogden v. Michigan Bell Telephone Co.*, 571 F. Supp. 520, 521 (E.D. Mich. 1983), review under ERISA's fiduciary standards is proper only in reference to accrued benefits. *Sutton*, 724 F.2d at 410; *United Electrical Radio and Machine Workers of America v. Amcase Industrial Corp.*, 634 F. Supp. 1135, 1142 (S.D. Ohio 1986). As the social security option was a mere means of payment of an early retirement benefit, it was not an accrued benefit. *E.g.*, *McBarron v. S & T Industries, Inc.*, 771 F.2d 94, 99 (6th Cir. 1985); *Bencivengo v. Western Pennsylvania Teamsters*, 763 F.2d 574, 578 (3d Cir. 1985). As the option was not an accrued benefit, the Allied defendants were not under an ERISA-created fiduciary duty in respect to same. *United Electrical Radio*, 634 F. Supp. at 1142. Accordingly, Count V fails to state a claim against the Allied defendants under ERISA. *Id.*

It is necessary to now look to the viability of plaintiffs' common law claims of misrepresentation against the Allied defendants.[4] In this regard plaintiffs assert the Allied defendants are governed by the standards set forth in the Restatement (Second) Torts Section 552 dealing with the negligent supplying of information.[5] *See Ingram Industries, Inc. v. Nowidke*, 527 F. Supp. 683 (E.D. Ky. 1981) (scope of liability of an accountant for negligence causing loss to a third party).

It is not disputed that Allied counseled the Group 3 plaintiffs that Armco would not offer the social security option. It is further obvious the Group 3 plaintiffs relied, justifiably, upon those assertions in choosing to retire from Allied and forgoing employment with Armco. As this information subsequently proved to be false, the question becomes whether Allied failed to exercise reasonable care in obtaining this information. *See* Restatement (2d) Torts 552(1).

The undisputed facts of the case lead the undersigned to believe Allied did not so fail. Prior to the plant sale Allied and Armco representatives met on various occasions to discuss the terms of the sale. During these meetings Allied was informed that the Armco Pension Plan contained no social security option and Armco had no intention to provide such option to the Allied employees. Further, immediately prior to the sale at a meeting between Allied and OCAW representatives, Allied counseled the OCAW that the social security option would not be offered by Armco. These comments raised no objection from an Armco representative attending the meeting for the express purpose of ensuring that the information conveyed by Allied was consistent with Armco's understanding and intentions.[6]

It can hardly be said Allied acted unreasonably in relying upon the repeated assurances of Armco that no social security option would be provided. The undersigned is at a loss at to what more Allied could have done to ascertain Armco's intentions in this regard.

Accordingly, it is recommended that the Allied defendants' motion for summary judgment as to Count V be granted.

COUNT VA

As stated earlier, the Group 3 plaintiffs allege in Count VA the Armco defendants' failure to inform either Allied or themselves of its intention to furnish the social security option constituted misrepresentation in breach of ERISA fiduciary and common law duties.

Armco first argues that as ERISA prohibits any but those who are participants in or beneficiaries of a plan from suing for an alleged breach of duties by the fiduciaries of the plan and as the Group 3 plaintiffs are clearly neither, this court lacks subject matter jurisdiction. *See* 29 U.S.C. Section 1132(a) (1) (B); *Kuntz*, 785 F.2d 1410; *Freeman v. Jacques Orthopaedic Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983), *Pressrooms Union v. Continental Assurance Co.*, 700 F.2d 889, 893 (2nd Cir. 1983); *Nugent v. Jesuit High School for New Orleans*, 625 F.2d 1285, 1987 (5th Cir. 1980).

The Group 3 plaintiffs argue that by agreeing in principle and under the sales agreement to the preservation of pension rights, Armco conferred "unknowing" participant status upon the Group 3 plaintiffs and thereby became a "constructive fiduciary." The undersigned finds this argument less than compelling. The language of section 1132 requires one be a participant to bring suit under ERISA. *Id.* Despite plaintiffs' vague protestations to the contrary, they can in no way be viewed as participants when they were never employed by Armco.[7] *Freeman*, 721 F.2d at 656. As the Group 3 plaintiffs are not participants, this court lacks subject matter jurisdiction under 29 U.S.C. Section 1132. *Id.*

Accordingly, it is recommended that the claims of the Group 3 plaintiffs against the Armco defendants contained in Count VA be dismissed for want of subject matter jurisdiction without prejudice to state law claims they might pursue.

COUNT VI

Plaintiffs have at various times attempted recharacterization of Count VI of the amended complaint as either a claim brought on behalf of the OCAW under section 301 of the LMRA, 29 U.S.C. Section 185, or an ERISA claim under section 502. Plaintiffs latest interpretation appearing in the response casts Count VI as one for breach of fiduciary duty resulting from Allied's alleged breach of the collectively bargained agreement between Allied and the OCAW brought on behalf of the Group 3 plaintiffs.[8] If viewed in this manner Count VI must fail for the reasons set forth earlier in the discussion of Count V. A similar result obtains if Count VI is viewed, as it appears on its face, as a section 301 claim brought on behalf of the OCAW.[9]

If so viewed, Count VI must be dismissed as outside the applicable period of limitation. *See, e.g.*, *DelCostello*, 462 U.S. at 151); *Local Union 3- 523, OCAW v. Allied Corp. and Armco, Inc.*, Catlettsburg Civil Action No. 82-202, Memorandum Opinion and Order (E.D. Ky., November 22, 1983). Further, the alleged breaches of the collectively bargained plan upon which Count VI is founded are believed to be without merit by the undersigned based upon the reasoning in the earlier report and recommendation as adopted in the Memorandum Opinion and Order dated September 18, 1986 and as set forth herein above. As such Count VI should be dismissed.

Accordingly, for the above-stated reasons, it is hereby recommended that the Allied and Armco defendants' motions for summary judgment as to the claims of the OCAW and Group 3 plaintiffs contained in Counts V, VA and VI be granted.

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. __, 38 CrL 3031 (December 4, 1985); Rule 72(b), Fed.R.Civ.P.

This the 6th day of January, 1987.

JOSEPH M. HOOD
UNITED STATES MAGISTRATE

Date of Entry and Service:

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[1] The factual background surrounding the present dispute is fully set forth in the earlier Report and Recommendation of the undersigned and in the Memorandum Opinion and Order adopting same. A such it will not be repeated herein except as necessary.

[2] The Group 3 plaintiffs are those plaintiffs who retired from Allied and forewent employment with Armco. At the time of retirement all but one of the Group 3 plaintiffs were eligible for the "social security" or "level income" option contained in Article VII of the Allied Plan. Under this option an employee retiring before reaching eligibility for social security receives a level total retirement income by receiving higher than normal pension benefits before his federal social security benefits commence and lower pension benefits thereafter.

[3] 29 U.S.C. Section 1113:

> 1113. Limitation of actions
>
> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

[4] The Allied plaintiffs argue these claims are preempted by ERISA's broad sweep. *See, e.g., Metropolitan Life Insurance v. Massachusetts,* __ U.S. __, 105 S.Ct. 2380, 2389 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983). However, it is obvious that as the present claims do not fall within ERISA's protection, neither are they subject to ERISA preemption. *See, Ogden,* 371 F. Supp. at 523 (state law claims preempted only when another remedy is provided for the wrong alleged).

[5] Restatement 2d Torts Section 552 states in relevant part:

> Section 552. Information Negligently Supplied for the Guidance of Others
>
> (1) One who, in the course of his business, profession or employement, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to *exercise reasonable care or competence* in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty if created, in any of the transactions in which it is intended to protect them. The standards impose a discreet and definite burden upon the plaintiff. He must establish by the evidence and persuade the fact finder that the limiting factors to liability have been overcome. Whether the plaintiff is able to carry this burden can only be assessed in light of the total evidence presented by the contending parties. Therefore, the issue cannot be decided until the facts are fully presented. At trial on the merits, the Court believes the parties will raise the issue and the required standards can then be added.

(emphasis added).

[6] It would appear Allied's first knowledge of Armco's intention to provide the social security option was acquired some ten months after the sale when Armco officials first notified former Allied employees of their intention to provide same.

[7] As the gist of the plaintiffs' complaint is that they forewent employment with Armco based upon misrepresentation, they cannot now argue they are participants in Armco's Plan. *See Freeman*, 721 F. 2d at 656 (the very thrust of Freeman's complaint is that he did not participate in the plan because he

was mislead to the cost of participation. Yet, for whatever reason, he did not in fact participate. "This court cannot rewrite history and declare that he did participate").

[8] If this claim is construed as being brought on behalf of the OCAW under section 502, it must be dismissed as the union has no standing to bring such suit. *See, e.g., District 65, UAW v. Harper & Row Publishers, Inc.*, 576 F. Supp. 1468, 1476 (S.D. N.Y. 1983).

[9] Allied correctly notes that it must be assumed Count VI is raised by the Union plaintiffs as the Group 3 plaintiffs have not alleged that the OCAW breached its duty of fair representation and as such their claims are barred. *Vaca v. Sipes*, 386 U.S. 171, 185-187 (1967).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 83-282
DECIDED SEPTEMBER 18, 1986

ROBERT ROWE and
EUGENE S. DUNCAN, PLAINTIFFS

VS.

ALLIED CHEMICAL HOURLY EMPLOYEES'
PENSION PLAN AND ALLIED CORPORATION, DEFENDANTS

AND

CIVIL ACTION NO. 84-278

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, ET AL., PLAINTIFFS

VS.

ALLIED CORPORATION, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is currently pending before this Court upon cross-motions for summary judgment. Pursuant to 28 U.S.C. section 636(b) (1) (B), the matter was referred to the United States Magistrate Joseph M. Hood for initial consideration and recommendation. The Magistrate has filed his report and recommendation, which recommends granting of summary judgment to the defendants. The plaintiffs have filed objections to the report and recommendation, and the defendants have filed responses to the objections.

This action arises out of the sale of a coke plant by the defendant Allied Corporation [hereinafter Allied] to the defendant Armco, Inc. [Armco] on December 31, 1981. Before the sale, the plaintiffs were hourly employees of Allied and members of the Oil, Chemical Atomic Workers Union [OCAW]. These employees were covered by the Allied pension plan which was the product of collective bargaining between Allied and the OCAW. The following three provisions in the Allied plan are the subject of this lawsuit:

> (1) *Article IV(2) (a)* contains an 80-point early retirement provision which permits retirement when an employee's age and length of service equal 80. The plaintiffs who accepted employment with Armco and were eligible for the 80-point retirement before or at the time of sale and are referred to as the Group 2 plaintiffs.
>
> (2) *Article IX(4) (a)* enables an employee laid off within three (3) years of the date of eligibility for an 80-point pension to receive credit for the period of the lay-off towards an 80-point retirement. The plaintiffs who accepted employment with Armco and were within three years of reaching eligibility for an 80-point pension at the time of sale are known as Group 1 plaintiffs.
>
> (3) *Article VII* provides a "Social Security" or "level income" option which enables an employee retiring before reaching eligibility for social security to receive a level total retirement income by paying the pensioner higher than normal pension benefits before his social security benefits begin and lower pension benefits thereafter. The plaintiffs who retired from Allied and did not accept employment from Armco are referred to as the Group 3 plaintiffs.

It should be noted that the Magistrate has not discussed the claims of the Group 3 plaintiffs because the record was not stipulated as sufficient; therefore, the report and recommendation did not concern Count VA[1] of the amended complaint nor the majority of OCAW's claims which concerned the Group 3 plaintiffs. The parties will be directed to file supplemental motions and memoranda regarding these claims.

The claims of the Group 1 and 2 plaintiffs involve an employee pension benefit plan which must be reviewed under ERISA, 29

U.S.C. section 1001, *et seq*.

In Counts I and III, Group 1 and 2 plaintiffs respectively asset that allied and its Plan wrongfully denied benefits under 29 U.S.C. section 1132, and thereby breached fiduciary duties under section 404 of ERISA, 29 U.S.C. section 1104.

In Counts II and IV, Group 1 and 2 plaintiffs allege that Allied and its Plan violated section 208 of ERISA, 29 U.S.C. section 1058, by failing to transfer sufficient assets to Armco's Plan to pay 80-point pensions to Group 1. The plaintiffs also assert this insufficient transfer was a breach of fiduciary duty under section 404.

The last count involving Group 1 and 2 plaintiffs is Count VI which alleges Allied breached its collective bargaining agreement with the OCAW by violating provisions of the Allied Plan and thereby violated section 301 of the LMRA, 29 U.S.C. section 185.

The standard of review by this Court of the plan administrators' actions is whether the actions were arbitrary or capricious. This is the law in the Sixth Circuit although the plaintiffs object and argue they should receive *de novo* review. *See Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985).

The Magistrate is correct in stating that the gravamen of the Group 1 and 2 plaintiffs' argument is that Allied's sale of the coke plant to Armco triggered their entitlement to the Allied 80-point pension.

The Group 1 plaintiffs contend that the sale of the coke plant resulted in a lay-off and that as laid-off employees, they continued to accumulate service credit under Article IX(4) (a) of the Allied Plan while employed by Armco. The defendants argue that the Group 1 plaintiffs were never laid-off within the meaning of Article IX(4) (1) and thus were not eligible for the Allied 80-point pension benefit: these plaintiffs suffered no break in employment. The Magistrate accepted the defendants position on this argument and bolstered his conclusion by referring to holdings in cases with similar situations. The plaintiffs object to the Magistrate's conclusion and still contend that Group 1 plaintiffs were "laid-off" because Armco did not allow them to continue earning credit toward the 80-point pension. The Court has considered the record and the arguments and finds that the Group 1 plaintiffs were not entitled to the Allied 80-point pension because they were not "laid-off" within the meaning of the Allied Plan and did not suffer a break in employment. Therefore, the defendants' decision that the Group 1 plaintiffs ceased to be Allied employees before satisfying the conditions for eligibility under the Plan was neither arbitrary nor capricious.

As for the claims of Group 2 plaintiffs, the Magistrate states that the defendants' decision to deny benefits to these employees had a reasonable basis since the Group 2 plaintiffs failed to retire while they were still employed by Allied and under the Allied Plan. Retirement was a prerequisite to receiving the 80-point pension under the Allied plan. These plaintiffs argue that the defendants acted arbitrarily and capriciously by imposing a condition not contained in the Allied Plan—i.e. that they choose between employment with Armco and their entitlement to benefits under the Allied Plan. As the Magistrate has stated, these plaintiffs failed to retire while employed by Allied. The Court finds that the defendants did not unilaterally amend the Allied Plan as the plaintiffs contend. The Court further finds that the defendants' decision to deny Group 2 plaintiffs benefits was neither arbitrary nor capricious.

Finally, the plaintiffs argue that the defendants violated section 208 of ERISA, 29 U.S.C. section 1058, by failing to transfer sufficient assets to the Armco Plan, and that this insufficient transfer prevents the Group 1 and 2 plaintiffs from receiving benefits equal to or greater than they were entitled to immediately before the transfer.[2] The Magistrate concluded that even if the transfer did cause a disparity in the plaintiffs' early retirement benefits, such transfer did not violate section 208, which has been read to require that the benefits to be compared on a termination basis be accrued benefits, because early retirement benefits are not accrued benefits according to the Sixth Circuit. *See McBarron v. S & T Industries, Inc.*, 771 F.2d 94, 99

(6th Cir. 1985); *accord Bencivenga v. Western Pennsylvania Teamsters and Employees Pension Fund*, 763 F.2d 574 (3d Cir. 1985).

The plaintiffs have objected to the Magistrate's conclusion and now assert that early retirement benefits *are* accrued benefits according to the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985). The plaintiffs argue that the Court should apply *Amato, supra*, and that *McBarron* did not concern early retirement benefits. In *McBarron, supra*, the Sixth Circuit stated: "In our view, ERISA does not give an employee any nonforfeitable right to early retirement benefits. The express wording of the statute makes this clear: 'Each pension plan shall provide that an employee's right to *normal* retirement benefits is nonforfeitable upon the attainment of *normal retirement age*.' " *Id.*, at 99 (emphasis is original). Accrued benefits are nonforfeitable. The Court finds that the defendants' transfer of assets into the Armco Plan did not violate section 208.

Accordingly, the Court can find no breach of fiduciary duty by the defendants under section 404 of ERISA, 29 U.S.C. section 1104, or common law.

It should be noted that the plaintiffs have objected to the Magistrate's statement that any state law claims which the plaintiffs have attempted to or may assert should be disregarded give the broad sweep of ERISA; the Magistrate cited *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). The plaintiffs assert that such a statement is premature and that each claim should be considered. Since this action concerns an employee pension benefit plan covered by ERISA, 29 U.S.C. section 1101 *et seq*, state law claims would be preempted according to the Supreme Court in *Shaw, supra*.

In summary, the Court finds that the Group 2 plaintiffs were not "laid-off" within the meaning of the Allied Plan and that the Group 1 plaintiffs did not retire while employed by Allied and while they were participants under the Allied Plan. The Court further finds that the decisions of the defendants relating to the retirement benefits of the plaintiffs in Groups 1 and 2 were neither arbitrary nor capricious. The Court can find no breach of fiduciary duty by the defendants under 29 U.S.C. section 1104.

IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

(1) That the defendants' motion for summary judgment is SUSTAINED as to all counts concerning plaintiffs in Groups 1 and 2;

(2) That the plaintiffs' motion for summary judgment is OVERRULED;

(3) That the parties shall file supplemental motions and supporting memoranda regarding the claims for Group 3 plaintiffs on or before Friday, October 24, 1986;

(4) That this action is hereby referred to the United States Magistrate Joseph M. Hood for a report consideration and recommendation concerning the Group 3 plaintiffs' claims and motions.

This 18 day of September, 1986.

Henry R. Wilhoit, Jr., Judge

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[1] Count VA alleges Armco's failure to inform Allied or the Group 3 plaintiffs of its intention to furnish the Social Security option was wilful or negligent misrepresentation and a breach of fiduciary duty under the Armco Plan and common law.

[2] Section 208 of ERISA provides: "A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan has then terminated).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 83-282

ROBERT ROWE and
EUGENE S. DUNCAN, PLAINTIFFS,

VS:

ALLIED CHEMICAL HOURLY EMPLOYEES'
PENSION PLAN AND ALLIED CORPORATION, DEFENDANTS.

AND

CIVIL ACTION NO. 84-278

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, ET AL, PLAINTIFFS,

VS:

ALLIED CORPORATION, ET AL, DEFENDANTS.

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter is presently before the undersigned for a report and recommendation upon the parties cross-motions for summary judgment[1]

This action arises out of the sale of a coke plant by the defendant Allied Corporation (Allied) to the defendant Armco, Inc. (Armco) on December 31, 1981. Until the time of the sale, the individual plaintiffs in this action were hourly employees of Allied and members of the Oil, Chemical and Atomic Workers Union (OCAW).

These employees were covered by a pension plan (the Allied Plan) which was the product of collective bargaining between Allied and the OCAW. The Allied Plan contains three provisions which are now the subject of this litigation.

Article IV(2) (a) of the Allied Plan contains an 80 point early retirement provision permitting retirement when an employee's age and length of service equal 80. The plaintiffs eligible for 80 point retirement at or before the time of sale who accepted employment with Armco are referred to as Group 2 plaintiffs.

Article IX(4) (a) of the Allied Plan enables an employer laid-off within three years of the date of eligibility for an 80 point pension to receive credit for the period of lay-off towards an 80 point pension. The plaintiffs within three years of reaching eligibility for an 80 point pension at the time of the sale who accepted employment with Armco are referred to as Group 1 plaintiffs.

Article VII of the Allied Plan proves a "Social Security" or "level income" option which enables an employee retiring before reaching eligibility for social security to receive a level total retirement income by paying a pensioner higher than normal pension benefits before his federal social security benefits commence, and lower pension benefits thereafter. Plaintiffs who retired from Allied and forewent employment with Armco are referred to as Group 3 plaintiffs.

Counts 1 and III of the complaint apply to Groups 1 and 2 respectively. Both counts present claims brought under section 502 of the Employment Retirement Security act of 1974 (ERISA), 29 U.S.C. Section 1132, for wrongful denial of benefits under the allied Plan. Each count also alleges that the failure of Allied and its Plan to pay such benefits constitutes a breach of fiduciary duties in violation of section 404 of ERISA, 29 U.S.C. Section 1104.

Counts II and IV assert statutory violations of ERISA under section 208, 29 U.S.C. Section 1058. Count II alleges that by failing to transfer assets to Armco's Plan sufficient to pay Group I 80 point pensions, Allied and its Plan violated section 208 and their fiduciary duties under section 404. Count IV alleges that the transfer resulted in a dimunition of the benefits to which Group 1 and 2 plaintiffs were entitled in violation of section 208.

Count V alleges that Allied and or its Plan wrongfully induced Group 3 plaintiffs to retire and that same constituted wilful or negligent misrepresentation in violation of the Allied Plan and fiduciary duties of section 404 and common law duties.

Count VA alleges that the failure of Armco to inform Allied or the Group 3 plaintiffs of their intention to furnish the Social Security option constituted wilful or negligent misrepresentation and that such conduct was a breach of fiduciary duties of the Armco Plan in violation of section 404 and common law duties.

Count VI is brought under section 301 of the LMRA, 29 U.S.C. Section 185, and alleges that by violating the provisions of the Plan as set forth in the prior courts allied breached its collective bargaining agreement with OCAW.

As it has not been stipulated that the record is sufficient to enable the undersigned to address the claims which Group 3 plaintiffs assert against the Armco defendants in Count VA of the amended complaint, in the interest of judicial economy the undersigned withholds discussion of all Group 3 claims pending filing of supplemental motions. Further, inasmuch as the claims asserted on behalf of the OCAW are in large part based upon the Group 3 claims, the undersigned defers discussion of these claims until such time as the Group 3 claims can be resolved.

The Allied Plan which lies at the heart of the Group 1 and 2 plaintiffs' claims is an ''employee pension benefit plan, and as such must be reviewed in terms of (ERISA), 19 U.S.C. Section 1001, *et seq*.[2] The role of the court is, therefore, limited to determining whether the actions of the plan administrators were arbitrary and capricious. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454 (6th Cir. 1874), *cert. denied*, 105 S.Ct. 786 (1985); *Washburn v. Allied Corporation*, Ashland Civil Action No. 83-295 (E.D. Ky. December 20, 1985) (Wilhoit, J.).

The gravamen of Group 1 and 2's argument is that Allied's sale of the coke plant to Armco triggered their entitlement to the Allied Plan's 80 point pension.

Group 1 plaintiffs claim that the sale of the plant resulted in a lay-off, and, that as laid-off employees, they continued to accrue service credit under Article IX(4) (a) of the Allied Plan. The Allied defendants state that these plaintiffs were not "laid-off" within the meaning of Article IX(4) (a), as they suffered no break in employment, and thus are not eligible for the Allied 80 point benefit because they ceased to be Allied employees before they satisfied the preconditions for eligibility. Group 1 plaintiffs argue that the denial of benefits based upon the above interpretation is arbitrary and capricious as a period of unemployment cannot be considered the *sine quo non* for benefits under Article IX(4) (a) without contravening its explicit language and purpose.

> Generally speaking, trustees [administrators] are knowledgeable of the details of a trust fund (both its purpose and its operation) and thus they are in a position to make prudent judgments concerning participant eligibility. Courts are extremely reluctant to substitute their judgment for the judgment of the trustees, and will do so only if the actions of the trustees are not grounded on any reasonable basis.

Blakeman, 779 at 1150 (citing *Ponce v. Construction Labours Pension Trust for Southern California*, 628 F.2d 537, 542 (9th Cir. 1980).

Article IX(4) (a) does not explicitly define what constitutes a "lay-off" or implicitly require the reading propounded by the Group 1 plaintiffs. The uncontroverted facts show that none of the Group 1 plaintiffs were eligible for an 80 point pension while employed at Allied; all went directly from Allied to Armco without a break in employment; and each received credit under the Armco Plan for his years of service with Allied.

The record shows that the Allied defendants made clear distinctions between employees who were "laid-off" prior to the sale and those who would continue in employment with Armco. (*See* Stipulation of Fact 6, 19; Attachment H - Memorandum of Understanding between Armco, Inc. and United Steelworkers of America). The Allied defendants' interpretation of Article IX(4) (a) to require an employee to suffer a period of unemployment to be deemed "laid- off" is consistent with their prior practice and supported by the weight of authority. *See, e.g.*, *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214 (D. Minn. 1985). The decision of the Allied defendants that Group 1 plaintiffs ceased to be Allied employees before satisfying the preconditions for eligibility under the Plan was neither arbitrary nor capricious. *See, e.g.*, *Blakeman*, 779 at 1150, 1151.

A similar result obtains as to the Group 2 plaintiffs. These plaintiffs argue that Allied's denial of benefits was arbitrary and capricious in that it required that they retire from Allied or accept employment with Armco, a condition not contained in the Plan.

The Allied defendants contend that Article IV(2) (c) requires that an employee retire from Allied before he can receive retirement benefits and that Group 2 plaintiffs declined to retire while they were still allied employees and participants in the Allied Plan.

The facts again are uncontroverted that each Group 2 plaintiff was counseled by Allied representatives before the plant sale that he could either retire from Allied and receive the 80 point pension or go to work for Armco and become a participant in Armco's pension plan eligible for a pension upon retirement from Armco. Upon their decision not to retire from Allied, assets to fund their 80 point benefits were transferred by Allied to Armco.

Plaintiffs have attempted to argue throughout that the Allied defendants acted arbitrarily and capriciously in their denial of benefits in that they imposed a condition or standard not contained in the plan, *i.e.*, that plaintiffs choose between employment with Armco or their entitlement to benefits under the Allied Plan[3] The record, however, clearly shows this argument to be a mischaracterization as the plaintiffs were denied benefits on the grounds that they failed to satisfy preconditions of the Plan, *i.e.*, retirement from Allied, while a participant of the Plan. The choice made by the plaintiffs of whether to seek benefits under the Allied plan or go to work for Armco was not used by Allied in the determination of eligibility for benefits but rather in the determination of whether to transfer assets from the Allied Plan to the Armco Plan on behalf of these employees.

Plaintiffs obviously could have chosen to retire from Allied and then put in an application with Armco (or other employers) and taken their chances of being hired. Instead, they chose guaranteed employment with Armco under the Sales Agreement at which point Allied transferred assets to fund their Armco Pension. Thus, when plaintiffs later sought benefits from Allied, the Allied defendants, quite reasonably, determined that plaintiffs had failed to retire while Allied employees and participants in the Allied Plan. The undersigned finds the decision to deny Group 2 plaintiffs benefits to be grounded on a reasonable basis and in no way arbitrary or capricious. *Id.*

Plaintiffs further contend that the Allied defendants violated section 208 of ERISA, 29 U.S.C. Section 1058, in that they failed to transfer sufficient assets and that same renders Group 1 and 2 plaintiffs unable to receive benefits equal to or greater than the benefits to which they were entitled immediately before the transfer.[4] Even assuming the transfer to cause a disparity in plaintiffs' early retirement benefits, section 208 has been read to require that the benefits to be compared on a termination basis be accrued benefits. *See, e.g.*, *Van Orman v. American Ins. Co.*, 608 F. Supp. 13, 25 (D. N.J. 1984). As early retirement benefits do not constitute accrued benefits, their contention is without merit. *McBarron v. S & T Industries, Inc.*, 771 F.2d 94, 99 (6th Cir. 1985); *Bencivenga v. Western Pennsylvania Teamsters and Employees Pension Fund*, 763 F.2d 574 (3d Cir. 1985); *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984).

The Group 1 and 2 plaintiffs also claim that the defendants breached fiduciary duties contained in section 404 of ERISA, 29 U.S.C. Section 1104. However, as the early retirement benefits in issue are not subject to ERISA protection as accrued benefits, *id.*, and for the reasons set forth above, these claims also must fail.

Accordingly, for the above-stated reasons, it is hereby recommended that the defendants' motions for summary judgment be granted in respect to the claims set forth on behalf of the Group 1 and 2 plaintiffs[5].

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same orr further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, __ U.S. __, 38 CrL 3031 (December 4, 1985); Rule 72(b), Fed.R.Civ.P.

This the 10th day of June, 1986.

JOSEPH M. HOOD
UNITED STATES MAGISTRATE

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[1] This report and Recommendation addresses Civil Action No. 84-2/8, *OCAW International, et al v. Allied Corporation, et at,* and its companion case *Rowe and Duncan v. Allied Corporation, et al,* Civil Action No.. 83-282, said cases being consolidated for purposes of discovery and trial pursuant to Rule 42(a), Fed.R.Civ.P., by Order of this court dated May 17, 1985.

[2] Further, in view of ERISA's broad presumptive sweep, it is readily apparent that to the extent Group 1 and 2 plaintiffs attempt to assert any state law claims they should be disregarded. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

[3] Further, to the extent the Group 2 plaintiffs misled the Allied defendants to believe they would not seek to retire under the Allied Plan and Allied transferred funds in reliance on these declarations, plaintiffs should be estopped from now seeking same. *Apponi v. Sunshine Biscuits, Inc.*, 652 F.2d 643 (6th Cir. 1981).

[4] Section 208 states in relevant part:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan has then terminated).

[5] The parties should be directed to submit additional memoranda addressing the Group 3 claims.

③

Supreme Court, U.S.
FILED
NOV 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-729

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT ROWE, *et al.*,
Petitioners,
v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS ARMCO INC. AND THE ARMCO INC. PENSION AGREEMENT PLAN IN OPPOSITION TO CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED WITH RESPECT TO THE ARMCO RESPONDENTS

The only question directly involving the Armco Respondents which is properly presented for review is included in Petitioners' Question VI, which in part concerns whether the District Court lacked subject matter jurisdiction over the Group 3 Petitioners' ERISA claim against the Armco Respondents. The Armco Respondents frame that question as follows:

> Whether the Court of Appeals correctly affirmed the decision of the District Court that it lacked subject matter jurisdiction over the ERISA-based fiduciary duty claim of the Group 3 Petitioners against the Armco Respondents on the ground that the Group 3 Petitioners were not participants in the Armco pension plan.

PARTIES TO THE PROCEEDING AND LIST OF SUBSIDIARIES AND AFFILIATES

The parties to the proceeding, including the names of the individual Petitioners, are listed in the Petition. The Respondents are Armco Inc., Allied Corporation, and the pension plans they maintain for certain of their hourly represented employees—the Allied Chemical Corporation Hourly Employees' Pension Plan ("the Allied Plan") and the Armco Inc. Pension Agreement Plan ("the Armco Plan"). For ease of reference, and consistent with the proceedings below, Armco and its Plan will be referred to together herein as "the Armco Respondents" and Allied and its Plan as "the Allied Respondents."

The individual Petitioners are all former hourly employees of Allied at its former coke-producing facility in Ashland, Kentucky. While working for Allied the individual Petitioners were represented for collective-bargaining purposes by Petitioner Local 3-523, Oil Chemical & Atomic Workers International Union, AFL-CIO ("OCAW").

Armco Inc. owns in part or is affiliated with the following companies: Acerex; Aceros Del Sur S.A.; Armco Columbo S.P.A.; Armco Equipetrol S.A.; Armco Industrial S.A.; Armco Instapanel, S.A.; Armco Moly-Cop S.p.A.; Armcopaxi S.A.; Armco Peruana S.A.; Australian Steel & Mining Corporation, Pty. Ltd.; Black River Lime Company; Bundy Venezolana C.A.; Control International, Inc.; D.I.F.S.I.C.A; Charles Fulton Holdings Ltd.; Charles Fulton Pty. Ltd.; Charles Fulton Sendirian Berhard; Charles Fulton 1982 Ltd.; Inmobiliara Hierro y Accro, S.A.; Metaltubos C.A.; Northern Land Company; Obras Civiles e Industrias C.A.; Productos Metalicos

Armco S.A.; Prolansa (Productora de Alambres y Derivados S.A.); Reserve Mining Company; Torcad Limited; Winning Post Investment Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-729

ROBERT ROWE, *et al.*,

Petitioners,

v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN, *et al.*,

Respondents

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF OF RESPONDENTS ARMCO INC. AND THE ARMCO INC. PENSION AGREEMENT PLAN IN OPPOSITION TO CERTIORARI

STATUTES INVOLVED

As respects the claim of the Group 3 Petitioners against the Armco Respondents, the case involves the following provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* ERISA § 3(7), 29 U.S.C. § 1002(7):

> The term "participant" means any employee or former employee of an employer, or any

> member or former member of an employee organization, who is or may be eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2):

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought —
>
> * * *
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.

COUNTERSTATEMENT OF THE CASE

These consolidated actions[1] concern pension-related issues arising from the sale by Allied to Armco of a coke-producing facility in Ashland, Kentucky. The Petitioners are divided into three groups, as they were as plaintiffs below. The Group 1 and 2 Petitioners asserted claims against the Allied Respondents only, which generally concern whether they were entitled to "80-point" early retirement pensions from Allied upon the sale. In separate counts, the Group 3 Petitioners asserted common law and ERISA-based claims against both the Allied and Armco Respondents. As respects the Armco Respondents, the matter before this Court involves only the ERISA-based claim of the Group 3 Petitioners asserted in Count VA of the Amended Complaint. That claim was dismissed by the District Court for lack of subject matter jurisdiction because these Petitioners were never employed by Armco and were not participants in the Armco Plan. The Court of Appeals affirmed that decision.

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[1] The original action herein, *Robert Rowe, et al. v. Allied Chemical Hourly Employees Pension Plan, et al.*, Civil Action No. 83-282, was consolidated with *Oil, Chemical and Atomic Workers International Union, et al. v. Allied Corporation, et al.*, Civil Action No. 84-278.

The facts upon which the decisions of the lower courts rest are stipulated by the parties. As to issue of the District Court's subject matter jurisdiction over the claim of the Group 3 Petitioners against the Armco Respondents, the facts may be simply stated: all of the Group 3 Petitioners retired from Allied prior to the sale of the coke plant; none of them was ever employed by Armco and none was, therefore, ever a participant in the Armco Plan.

The terms of the sale were embodied in a written agreement dated December 31, 1981, executed by Allied and Armco. Upon the sale, Armco provided uninterrupted employment to all hourly employees on the Allied payroll at the date of sale. The sales agreement contains provisions governing pension benefits for the Allied employees hired by Armco. Allied employees who retired from Allied on or before the sale date or who were not hired by Armco continued to be covered solely under the Allied Plan.

Under the sales agreement, Allied transferred to the Armco Plan funds equivalent to the actuarial value of the benefits earned under the Allied Plan as of the date of sale by those former Allied employees hired by Armco. Armco agreed to credit the service of each such employee under the Allied Plan for eligibility or vesting. Those employees could then, upon retirement from Armco, elect benefits under the Armco Plan based on their combined Armco-Allied service, or they could elect the benefits accrued under the Allied Plan as of the date of sale plus any benefits accrued under the Armco Plan subsequent to sale. Under the sales agreement, Armco also agreed to incorporate into the Armco Plan an early retirement feature of the Allied Plan, known as the "80-point pension," for those Allied employees who were hired by Armco and who at the time of sale were eligible to receive this benefit under the Allied Plan.

The Group 3 Petitioners were eligible, upon retirement under the Allied Plan, for an optional method of pension payments known as the Social Security option.[2] The Armco Plan did not have such a payment option, and, during pre-sale negotiations with Allied, Armco spokesmen indicated that Armco would not adopt it. The sale proceeded on that basis. Almost a year later, when confronted with a specific claim and threatened litigation by a coke worker formerly employed by Allied, Armco reexamined the issue and decided to adopt the option.

The Group 3 Petitioners allege that during the presale negotiations with Allied, the Armco Respondents willfully or negligently misrepresented that they would not provide a Social Security option under the Armco

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[2] Essentially, the Social Security option enabled an employee to retire early and receive higher than normal retirement payments until he or she became eligible to receive Social Security payments, at which time the retirement payments would be adjusted to a lower than normal level. The option is designed to provide a relatively level revenue stream for early retirees.

Plan for former Allied employees, and that in reliance on this alleged misrepresentation the Group 3 Petitioners retired from Allied prior to the sale, instead of going to work for Armco. The Group 3 Petitioners contend that this alleged conduct of the Armco Respondents violated their common law duty to the Group 3 Petitioners and breached their duties as fiduciaries of the Armco Plan under § 404 of ERISA, 29 U.S.C. § 1104.

Summary judgment was entered on behalf of all Respondents with respect to the Group 3 claims on April 1, 1987 (and with respect to the Groups 1 and 2 claims on September 16, 1986). With respect to the Group 3 claim against the Armco Respondents, the District Court adopted the January 6, 1987 Report and Recommendation of Magistrate Joseph M. Hood (Pet. App. 22a-30a), who had concluded that the court lacked subject matter jurisdiction over the Group 3 Petitioners' ERISA claim against the Armco Respondents because the Group 3 Petitioners were not and had never been participants in the Armco Plan.[3]

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[3] Neither the Magistrate nor the District Court addressed the merits of the Group 3 Petitioners' common law misrepresentation claims against the Armco Respondents. Having found that the Group 3 Petitioners could not assert a federal cause of action under ERISA, the Magistrate recommended that the Petitioners' state-law claims be dismissed for want of subject matter jurisdiction, without prejudice. Pet. App. 26a. Also, the court below did not address the question of which, if any, of the individual Petitioners actually relied on the alleged misrepresentation in deciding to retire. No facts were stipulated and no evidence was offered on that issue. No issue regarding these common law claims has been raised in the Petition.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court dismissing the Group 3 Petitioners' claim on jurisdictional grounds. The Court of Appeals held that the Group 3 Petitioners were not participants in the Armco Plan within the meaning of § 3(7) of ERISA, 29 U.S.C. §1002(7). Pet. App. 11a. The Court also held that the Social Security option was not an accrued benefit under ERISA and, therefore, any Armco decision with respect to the option was not reviewable under ERISA's fiduciary standards. Pet. App. 12a.

REASONS FOR DENYING THE WRIT

1. The Petition Does Not Seriously Question The Correctness Of The Decision Below And Confuses The Issues And Misstates The Facts As Respects The Armco Respondents.

Petitioners' treatment of the only question concerning the Armco Respondents (Question VI, Pet. 17), could not be more cursory.[4] In the one-half page

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[4] The composition of the Petition makes it difficult to discern whether Petitioners are attempting to implicate the Armco Respondents in other Questions presented for review. If so, Petitioners are raising such issues for the first time and, in any case, any such arguments appear to be based on fundamental misstatements of fact. For example, Petitioners' Question I asks "[w]hether . . . Allied *and Armco* unlawfully unilaterally amended the [Allied] Plan . . ." (Pet. i) (emphasis supplied). Similarly, in their argument, Petitioners wrongly state that "the Court of Appeals in its decision below accepted that Allied *and Armco* could amend the [Allied Pension] Plan." Pet. 10a (emphasis added). However, as the Court of Appeals (Pet. App. 5a, 7a-8a) and Petitioners themselves (Pet. 7) recognized, the claim of alleged unilateral amendment of the Allied Plan was asserted be-

Petitioners allot to the question, they do not seriously dispute the correctness of the decision of the Court of Appeals, they cite no precedent, let alone any precedent in conflict with the Court of Appeals, and they cite no reasons of policy justifying review by this Court. Petitioners make no effort to discuss the Sixth Circuit's reasoning on whether they were participants in the Armco Plan or on the alternative holding that the Social Security option is not an accrued benefit implicating ERISA fiduciary duties.

Petitioners merely hint at two possible related arguments. First, they assert that ERISA defines "participant" as including members or former members of an "employee organization" and that because Group 3 Petitioners were members of OCAW, an employee

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low against the Allied Respondents only. No question of Armco having allegedly amended the Allied Plan (if that is possible) was ever raised, briefed, or adjudicated.

The same observation applies to the Petitioners' claim under ERISA § 208 (29 U.S.C. § 1058). Although Petitioners' Question IV purports to ask "[w]hether *the Respondents* violated 29 U.S.C. § 1058 . . ." (emphasis added), that claim was raised below and adjudicated with respect to the Allied Respondents only. See Pet. 14-16; Pet. App. 5a, 8a-9a.

Finally, and although it is not clear, the Petitioners appear to characterize, wrongly, the OCAW as a party to the Group 3 claim against the Armco Respondents. They headnote their argument with respect to the Group 3 claim against the Armco Respondents as follows:

> This Court Should Review The Lower Courts [sic] Decision To Strip The Group 3 Petitioners *And The OCAW* Of Their Right To Challenge Armco's Action.

Pet. 17 (emphasis added). The OCAW was not a party to any claim against the Armco Respondents in the proceedings below.

organization, they are entitled to benefits under the Armco Plan. The purported argument stands singularly on that naked assertion with no authority, no discussion or reasoning and not the slightest reference to the Sixth Circuit's dismantling of the same argument below. Second, Petitioners contend that "Armco agreed to preserve the Group 3 Petitioners' options by contract and accepted assets from Allied for that purpose." Pet. 17. This is simply a misstatement of fact which flatly contradicts the stipulated record. It is the same misstatement of fact which was recognized as such and rejected by the Court below. As stipulated and as the Court of Appeals recognized, the sales agreement accorded rights under the Armco Plan *only* to former Allied employees whom Armco hired. Pet. App. 11a-12a. Thus, Armco agreed to preserve benefits *only* for those who became its employees, and Armco accepted assets from Allied *only* with respect to those who became its employees.[5]

Because Petitioners do not even suggest a conflict among the circuits or seriously question the decision below on the Group 3 jurisdictional issue, certiorari is not warranted. Rule 17.1, Supreme Court Rules. Indeed, the Petitioners' off-hand, confusing and inaccurate treatment of the issue leaves both Respondents and the Court uncertain as to the reasons behind the Petition and itself calls for denial of the Writ. Rule 21.5, Supreme Court Rules. The one contention articulated in the Petition amounts to a hypertechnical factual dispute which, aside from being contrary to the parties' stipulations, is not grounds for review. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

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[5] Further, it was stipulated that the amount of assets which were transferred to Armco's Plan by the Allied Plan for any individual did not take into account the Social Security option, which is the only subject of the Group 3 claims herein.

2. There Is No Conflict Among The Courts Of Appeals Concerning Any Issue Raised By The Petition.

Pursuant to the plain terms of ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), every Court of Appeals that has considered the question has held that, aside from the Secretary of Labor and plan fiduciaries, only participants and beneficiaries of a plan may bring an ERISA civil action for breach of fiduciary duties. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-45 (4th Cir. 1986); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986), *cert. denied*, 479 U.S. 916 (1986); *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983); *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983), *cert. denied* 464 U.S. 845 (1983); *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980); *Coleman v. General Electric Co.*, 643 F. Supp. 1229, 1234-36 (E.D. Tenn. 1986), *aff'd without published opinion* 822 F.2d 59 (6th Cir. 1987); 29 U.S.C. § 1132(a)(2). The decision of the Court of Appeals is consistent with this precedent.

In recognizing the clear and narrow limits on subject matter jurisdiction under ERISA, these decisions are also consistent with this Court's unanimous ruling in *Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983). There, a trust holding funds under an ERISA-covered employee benefit plan removed to federal court a state-court action brought by state tax authorities to enforce tax levies against the funds. This Court held that removal was improper because the state court action filed by the tax authorities did not and could not arise under ERISA, since the plaintiff state tax board was not within the limited statutory class of persons who may sue under ERISA:

> Section 502(a) specifies which persons—participants, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies or for other purposes.
>
> * * *
>
> ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 25, 27.

With respect to other ancillary issues raised below by the Group 3 Petitioners, the Sixth Circuit's decision is also consistent with precedent. Specifically, the Court of Appeals rejected Petitioners' contention below that their lack of participant status should somehow be "excused" for purposes of ERISA subject matter jurisdiction because the lack of participation was allegedly a result of purported misrepresentations by the Armco Respondents.[6] As the Ninth Circuit wrote in dismissing an ERISA fiduciary duty claim in similar circumstances:

> The very thrust of [plaintiff's] claim is that he did not participate in the plan because he was misled as to the cost of participation. Yet, for whatever reason, he did not in fact participate. This court cannot rewrite history and declare that he did participate.

Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc., supra, 721 F.2d at 656. The same result was reached under similar facts in other cases. *Stanton v. Gulf Oil Corp., supra; Loechl v. Illinois Bell Telephone Co.,* 648 F. Supp. 1178 (N.D. Ill. 1986);[7] *Coleman v. General Electric Co., supra,* 643 F. Supp. at 1234-36.[8]

In contrast, no Court of Appeals has accepted Petitioners' position. No Court of Appeals has held, as Petitioners suggest should be the rule (Pet. 17), that *any* member of an "employee organization" is a participant in the pension plan of an employer simply because the employee organization represents some of the employer's employees. In addition, no Court of Appeals has held that a person who *might have become* an employee of an employer qualifies as a person who "may become eligible" for a benefit under the employer's plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7). To the contrary, as recognized, that statutory language has been held to refer solely to current employees already covered by the employer's plan who will, upon meeting specified requirements, become eligible for benefits under the plan. It does not include persons, like Group 3 Petitioners, who never became participants in the plan. *Nugent v. Jesuit High School of New Orleans, supra*, 625 F.2d at 1287; *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d at 655; Pet. App. 12a.

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[6] This argument is not specifically restated in the Petition.

[7] In *Loechl,* the court held that it lacked ERISA subject matter jurisdiction over an action brought by former employees to obtain benefits under a special early retirement plan instituted after their retirement, despite the plaintiffs' allegation that they had retired under the regular plan in reliance on the employer's misrepresentation that the special plan would not be offered in the future. The court reasoned that the plaintiffs never became participants in the special plan.

[8] In *Coleman,* the court held that the buyer of a facility had no ERISA duty to employees of the seller during purchase negotiations; and, as non-employees of the buyer and non-participants in the buyer's plan, the seller's former employees could not bring an ERISA action for alleged misrepresentations with respect to the benefits to be provided under the buyer's plan.

In addition to ruling that the Group 3 Petitioners were not participants in the Armco Plan, the Court of Appeals held that because the Social Security option is not an accrued benefit under ERISA, any decision by Armco with respect to the option is not reviewable under ERISA fiduciary standards. Pet. App. 12a. Petitioners do not here contend that this ruling was incorrect. While the issue does not appear to have been addressed in the case law, the decision of the Court of Appeals is, in any event, fully supported by ERISA's legislative history. See H.R. Rep. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726; *see also* H.R. Conf.

Rep. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054.[9]

3. The Petition Does Not Present An Important Federal Question For Review By This Court.

The unanimity of the Court of Appeals decisions addressing the subject matter jurisdiction issue raised by Petitioners, as well as the consistency of those decisions with this Court's *Franchise Tax Board* opinion, verifies that no important federal question is here presented. No Court of Appeals has had difficulty applying the statutory definition of "participant" as it impacts on who may sue for breach of fiduciary duty. The clarity of ERISA § 502(a), as recognized in *Franchise Tax Board*, means that there is presented no substantial or genuine question of statutory construction. The Petitioners' halfhearted treatment of the issue bespeaks the run-of-the-mill nature of this case as respects the lack of ERISA subject matter jurisdiction. The application of straightforward statutory language to stipulated facts, carried out by the Court of Appeals in a facially correct manner, does not warrant further examination by this Court.

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[9] While the Court of Appeals did not address the point, we note that the decision is correct on the alternative ground that ERISA provides no redress for the claim of the Group 3 Petitioners against the Armco Respondents. The Group 3 Petitioners seek one basic remedy in this case - *i.e.*, compensatory damages for having foregone employment with Armco. They do not seek, nor can they be awarded, benefits under either the Allied or the Armco Plan, as they are presently being paid all benefits due under the former and never became participants in the latter. Nor do they assert that the Armco Plan has itself been financially damaged by the Respondents' alleged acts; rather, their claims are purely personal and, as such, not redressable under ERISA's fiduciary duty provisions. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), this Court held squarely that ERISA does not allow a private right of action for compensatory damages for an alleged breach of fiduciary duties.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: November 22, 1988

4

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CLERK

No. 88-729

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

ROBERT ROWE ET AL.,
Petitioners,
V.
ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN AND ALLIED CORPORATION

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QUESTIONS PRESENTED

1. Whether there are grounds to overturn the factual finding of the lower courts that Allied did not unilaterally amend the Allied Chemical Hourly Employees' Pension Plan by virtue of the sale of Allied's Ashland, Kentucky coke plant to Armco, Inc.

2. Whether there are grounds to overturn the factual finding of the lower courts that the Allied Plan Administrator's interpretation of the Plan's "layoff provision" was neither arbitrary nor capricious.

3. Whether the arbitrary and capricious standard of review was properly applied to the Allied Plan Administrator's denial of benefits to be paid from assets held in trust under a funded plan.

4. Whether there are grounds to overturn the factual finding of the lower courts that 29 U.S.C. § 1058 was not violated because the transfer of assets from Allied to Armco resulted in an equivalence of benefits before and after the sale.

5. Whether there are grounds to overturn the factual finding of the lower courts that Allied did not make misrepresentations to Petitioners concerning the Social Security provisions of the Armco Plan.

6. Whether the lower courts correctly held that Petitioners who were not Armco employees and who never became participants in the Armco Plan lack standing to sue Armco Respondents for breach of fiduciary duty.

LISTING OF PARTIES

Statement Pursuant to Rule 28.1

1. Respondent Allied Corporation was a subsidiary of Allied-Signal Inc. On September 30, 1987, Allied Corporation was merged into Allied-Signal Inc.

Allied-Signal Inc. has no parent company. Allied-Signal Inc.'s subsidiaries (except wholly owned subsidiaries) and affiliates are:

Allied-General Nuclear Services
ACE, Limited
Allied Holdings (UK) Limited
Bendix HVCG Europe Limited
Ferranti-Bendix Power Generation Limited
Jurid Werke, GmbH
Ingold Electrodes, Inc.
Enscor Inc.
Sonic Oil Separation, Ltd.
Allied Automotive Ltda.
Bendix France, S.A.
Amoricaine de Fonderia-Le Chatelet, S.A.
Bendix Deutschland GmbH
Bendix Electronics, S.A.
Bendix Ricambi, S.p.A.
Cierock Ricambi, S.p.A.
Dipra Ricambi, S.p.A.
Bendix Portuguesa Sociedede de Equipamentos
  Automoveid, Ltda.
Bronzavia Air Equipment, S.A.
D.B.A. S.I.B.E., SNC
France Automobile Service, S.A.
Freudenberg, S.A.
Iminor, S.A.
Societe Civile Immobiliere Prieur & Cie
La Decoration Moderne, S.A.
Sifra Industries, S.A.

Societe Civile Immobiliere due 60 Av. De La Grandee Armee
TENSA, S.A.
Transpar Iberica, S.A.
Bendix Italia, S.p.A.
Bendix Altechna Freni, S.p.A.
Bendix Mexicana, S.A. de C.V.
Bendix Pemsa Cinturones de Seguridad, S.A. de C.V.
FIAAM, S.p.A.
Garrett GmbH
Garrett Productos Automotrices S.A.
Turbo Services SNC
Sistemas Bendix de Seguridad S.A. de C.V.
Allied-Signal Flight Systems Company
Kalyani Brakes Limited
Bendix Electronics Korean, Limited
Bendix Electronic Service Corporation de Espana, S.A.
Bendix Espana, S.A.
Bendix-Jidosha Kiki Corporation
Bendix Mintex Proprietary Limited
Bendix Group Superannuation Pty., Ltd.
Bunker Ramo Electronic Data Systems S.A.
Chico Corporation
Compania Industrial de Fluorita, S.A.
Compania Metalurgica de Parral, S.A.
Garrett Comtronics Licensing Corp.
Globe Auto Electricals, Ltd.
Hankuk Brake Industrial Co., Ltd.
Industrial Turbines International Inc.
International Turbine Engine Corporation
Jidosha Kiki Co., Ltd.
Kanto Seiatsu Kogyo Co., Ltd.
Tokyo Chuzsho
Leaseway All-Services, Inc.
Manbritt Industries, Inc.
Nippon Amorphous Metals Co., Ltd.
Nirlon Synthetic Fibres and Chemicals, Ltd.
Normalair Garrett (Holdings) Ltd.

Dynamic Turbocharger Services Pty., Ltd. Queensland
Asia Pacific Resin Corporation
Doosan Electro-Materials Co., Ltd.
Financiere Allied-Signal S.A.
Nittobo-Norplex/Oak Inc.
Norplex/Oak India Ltd.
Oak Mitsui Inc.
Bendix Electronics, S.A.
Prestolite of India Ltd.
Quimobasicos, S.A.
Propelentes Mexicanos, S.A.
Sifra Industrie, S.A.
Societe Anonyme des Usines Chausson [SECAN]
Societe Wheelabrator-Allevard S.A.
Sofratype, S.A.
Synektron Corporation
Union Texas Petroleum Holdings, Inc.
UOP
Nikki/Universal Co., Ltd.
UM Holdings B.V.
Serind S.p.A.
UMMS Caribbean N.V.
Ataisa S.a.c.i.
Tecpro Industrial Chemicals Ltd.
UOP Management Services (Saudi Arabia) Limited

2. Respondent Allied Chemical Hourly Employees' Pension Plan has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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No. 88-729

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

ROBERT ROWE ET AL.,
Petitioners,
V.
ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN AND ALLIED CORPORATION

Respondents Allied Chemical Hourly Employees' Pension Plan and Allied Corporation (collectively "Allied") respectfully request that the petition for certiorari filed by Robert Rowe *et al.* be denied.

STATEMENT OF THE CASE

The facts underlying this litigation are set forth in the opinion of the Court of Appeals. The facts cited by the Court were largely derived from joint Stipulations of Fact which were submitted by the parties in lieu of a trial.[1] Allied Respondents submit the following supplemental statement to clarify the nature of the claims and proceedings below.

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[1] The parties' Stipulations of Fact are reproduced in Allied's Appendix. References to the stipulations are by page and paragraph, e.g., Allied App. 3, Stip. 1.

I. Factual Statement

The Allied Chemical Hourly Employees' Pension Plan (the "Allied Plan") is a collectively bargained pension plan which covered those employees at Allied's Ashland, Kentucky coke plant represented by the Oil, Chemical & Atomic Workers Union ("OCAW"). (Allied App. 3a, Stip. 4).

Under a Sales Agreement negotiated by Armco and Allied in late 1981 for the sale of the Ashland facility, Armco assumed responsibility for normal retirement benefits for those Allied employees who accepted Armco employment. (Allied App. 4a-5a, Stip. 8-9). In addition, Armco agreed to preserve and provide early retirement benefits, including an 80-point pension, for those Allied employees eligible for early retirement under the terms of the Allied Plan as of December 31, 1981, the closing date of sale. Allied agreed to transfer to Armco funds equivalent to the actuarial value of the benefits earned by those Allied employees who went to work for Armco; for each employee for whom funds were transferred, Armco agreed to credit service earned under the Allied Plan for eligibility and vesting. (Allied App. 5a-6a, Stip. 10). Allied transferred some $5 million to Armco to fully fund these benefits for the former Allied employees. (Allied App. 6a-7a, Stip. 11-14).

Those Allied employees who were not hired by Armco or who chose to retire from Allied at the time of sale continued to be covered under the Allied Plan. Consequently, Allied employees who were on layoff status prior to the sale continued to accrue service credit under the Allied Plan. (Allied App. 13a, Stip. 39).

Allied representatives met with OCAW prior to the sale to describe the pension provisions of the Sales Agreement. (Allied App. 9a-10a, Stip. 21-22). Allied did not propose to OCAW any amendments to the Allied Plan nor did it modify the Plan unilaterally. The Allied Plan has continued in existence during the time period relevant to this litigation with no substantive changes. The only modifications since the Plan was collectively negotiated in 1981 have been technical amendments required to comply with changes in the law. (J.A. 137).[2]

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[2] "J.A." refers to the joint appendix in the Court of Appeals.

Those employees who were eligible for an 80-point pension were counselled individually by Allied and advised that they could elect to retire under the Allied Plan prior to the sale; alternatively, they could elect guaranteed employment with Armco, have pension assets transferred to the Armco Plan on their behalf, and thereafter retire with an 80-point pension under the Armco Plan. The employees were specifically advised that the Armco Plan did not contain a provision equivalent to the Social Security leveling option in the Allied Plan. (Allied App. 10a-11a, Stip 24-25).

The Group 1 Petitioners were not eligible for an 80-point pension at the time of sale. Some three years following their employment by Armco, Group 1 Petitioners demanded payment of an 80-point pension by the Allied Plan. (Allied App. 12a, Stip. 34).[3] They claimed that the sale effected a layoff which entitled them to continuing service credit under Article IX(4)(a) of the Allied Plan. The Group 1 Petitioners' pension claims were denied by the Allied Plan Administrator on the grounds they were no longer participants in the Allied Plan when they sought a pension, the obligation to pay their Plan benefit was assumed by Armco, and they were not laid off from Allied's employ. (Allied App. 12a, 3b, Stip. 35 and Ex. B to Stip. of Fact).

The Group 2 Petitioners were eligible for an 80-point pension at the time of sale. To receive the pension, they need only retire under the Armco Plan. (Allied App. 14a, Stip. 50). Group 2 Petitioners nonetheless applied for an 80-point pension from the Allied Plan in 1984. (Allied App. 14a, Stip. 46). The Allied Plan Administrator denied their claims because they had not elected to retire or receive a deferred vested benefit while they were Allied employees and participants in the Allied Plan, and because provision was made to pay their benefits under the Armco Plan. (Allied App. 14a, 9b, Stip. 46-47 and Ex. E to Stip. of Fact).

The Group 3 Petitioners, who are receiving retirement benefits under the Allied Plan, claim they were wrongfully induced to retire by representations that the Social Security option would be unavailable if they accepted Armco employment and became participants in the Armco Plan. The Armco Plan contained no Social Security option in 1981, and all communications by Armco to

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[3] Petitioners Rowe and Duncan filed claims for an 80-point pension in 1983. (Allied App. 12a, Stip. 31-32).

Allied prior to the sale were that no Social Security option would be provided. (Allied App. 16a-17a, 19a, Stip. 62, 65, 68, 69, 91). Armco did not decide to provide the option until receipt of a demand letter from Petitioners' counsel nearly a year after the sale. (Allied App. 19a, Stip. 90, 92).

II. Decisions of the Lower Courts

Because there were no disputed issues of fact requiring determination by a fact-finder, the parties advised the District Court that they wished to stipulate the facts and submit the case to the court on the record without need for a trial. (Allied App. 1a-2a). Thereafter, a decision favorable to Allied and Armco was rendered in the District Court on motions and cross motions for summary judgment. (Pet. App. 13a-21a, 31a-36a).

A unanimous panel of the Court of Appeals for the Sixth Circuit affirmed the District Court's decision, holding as follows: 1) the Allied Plan Administrator's conduct in denying the Group 1 and Group 2 Petitioners' 80-point pension claims was not arbitrary, capricious, or in bad faith, and therefore did not violate Section 404 of ERISA, 29 U.S.C. § 1104 (Pet. App. 6a-7a); 2) Allied did not unilaterally amend the Allied Plan to eliminate the Group 1 and 2 Petitioners' 80-point pensions, in violation of Section 404 of ERISA (Pet. App. 7a-8a); 3) Allied's transfer of assets to Armco to fund the Group 1 and 2 Petitioners' pensions did not violate Section 208 of ERISA, 29 U.S.C. § 1058 (Pet. App. 8a-9a); and 4) Allied accurately advised the Group 3 Petitioners regarding the availability of the Social Security option under the Armco Plan, and therefore did not breach fiduciary duties under Section 404 of ERISA or common law duties. (Pet. App. 9a-10a). Without discussion, the Court of Appeals dismissed the Petitioners' remaining contentions as meritless. (Pet. App. 12a).[4]

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[4] Petitioners' reproduction of the Court of Appeals' decision contains a typographical error which substantively alters the Court's decision. The third sentence of the last paragraph under Part IV, page 9a of Petitioners' Appendix, should read as follows:

> The Group 2 plaintiffs were entitled to an 80-point pension under the Allied Plan before the transfer, and they are now entitled to an 80-point pension under the Armco Plan.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the questions presented for review involve reconsideration of factual issues determined below on a stipulated record. Petitioners' assertion that the decision below departed from the usual course of judicial proceedings is completely unsubstantiated; nor do Petitioners describe any genuine conflict between the holdings below and the decisions of other courts of appeals. Further, the decision of the Court of Appeals was without error and presents no significant issues meriting this Court's review.

I. THE PETITIONERS SEEK REVIEW OF FACTUAL FINDINGS BASED ON STIPULATED FACTS AND LIMITED TO THE PARTICULAR CIRCUMSTANCES OF THIS CASE.

Petitioners seek review of the factual findings reached by the District Court and affirmed by the Court of Appeals as not clearly erroneous. They ask this Court to reverse the lower courts' findings that the Allied Plan was not amended as a result of the plant sale; that the Plan Administrator's interpretation of the layoff provisions of the Allied Plan was consistent with past practice and was a reasonable interpretation of the Plan; that the transfer of assets from Allied to Armco resulted in an equivalence of benefits before and after the sale; and that Allied accurately represented the absence of a Social Security provision under the Armco Plan.

The disposition of these questions hinges in large measure on the interpretation of the Allied Plan and the Sales Agreement between Allied and Armco. This document review has already been undertaken, with unanimity of opinion on the correct interpretation, by the Plan Administrator, a United States Magistrate, the District Court and the Court of Appeals. Further, because the documents reviewed have application only to the unique circumstances presented by this case, there is no question of general public interest requiring this Court's attention. The decision below has a practical impact only on the litigants in this suit.

Moreover, a review of the lower courts' factual findings is particularly inappropriate since the findings were largely based on a stipulated record. Although Petitioners had an opportunity to request a hearing on any material controverted fact, they did not do so. No reason exists meriting this Court's review of the factual determinations of the lower courts.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER COURT OF APPEALS.

Although Petitioners allege conflicts between the decision below and the decisions of other courts of appeals as grounds for the Petition, they fail to identify any real conflict on the same issue of law.

A. The Interpretation of the Allied Plan Rests on Circumstances Unique to this Case and Presents No Conflict in Decisions.

Petitioners assail the interpretation of the layoff provision of the Allied Plan as being in conflict with the interpretations of other courts. Yet the decisions cited, *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985), and *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), involved interpretation of the particular plan documents at issue in those cases. In *Anderson*, the court found that a fair reading of the severance benefit plan *supported* the administrator's interpretation that employees who were retained by the purchaser following the sale of a business were not entitled to severance benefits from their former employer. 759 F.2d at 1522-1523.

Blau v. Del Monte Corporation, *supra*, differs in outcome only and does not create a conflict on a matter of law or fact. In *Blau* the appeals court reversed the lower court's summary judgment for the employer based upon evidence of "wholesale and flagrant" procedural violations of ERISA. In particular, the employer's concealment of its severance pay plan precluded it from interpreting the plan to deny benefits. 748 F.2d at 1353, 1355-1356.

In this case, the decision below was based upon the Allied Plan language, Allied's treatment of employees who were on layoff status at the time of the sale, past interpretations of the Plan, and the provisions in the Sales Agreement for transferring service credit for employees who went directly to Armco. (Pet. App. 6a-7a, 33a-34a, 40a-41a). The lower courts found *no* violations by Allied of ERISA's procedural requirements. The petition presents no conflict with the *Blau* or *Anderson* decisions and no question requiring review by this Court.

B. The Application of the Arbitrary and Capricious Standard of Review Does Not Present A Conflict.

There is no genuine conflict over the appropriate standard of review. Petitioners' assertion that the Sixth Circuit defied its own precedent by applying the arbitrary and capricious standard to review of a plan administrator's denial of benefits does not merit response. (Pet. 13-14). Petitioners reach this conclusion only by reciting different formulations of the same standard.

Further, the decisions from other courts of appeals cited by Petitioners concern fundamentally different issues. *See Bruch v. Firestone Tire and Rubber Co.,* 828 F.2d 134 (3d Cir. 1987), *cert. granted,* ___ U.S.___, 108 S.Ct. 1288 (1988); *Haeffele v. Hercules Inc.*, 839 F.2d 952 (3d Cir. 1988).[5] They involve the standard of review applicable to denial of benefits to be paid from the general assets of an employer rather than from assets held in trust under a funded plan. The benefits at issue in this case fall within the latter category.

In *Bruch*, the Court of Appeals reasoned that the plan administrator may have a conflict of interest if the administrator is also the employer and the plan at issue is unfunded, so that any benefits paid pursuant to the plan are paid directly by the employer out of general corporate funds. 828 F.2d at 138. The Court found that the deferential arbitrary and capricious standard is inappropriate where the employer who made the challenged decision is not protecting the rights of other beneficiaries but is the party who profits from the denial of benefits. 828 F.2d at 144-145.

The facts of this case are entirely distinguishable. The Allied Plan is a funded plan and therefore the Allied Plan Administrator's decision to deny benefits does not affect Allied's general funds.

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[5] In *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986), the appeals court did not address the issue of the appropriate standard of review when the plan administrator has a financial interest in the outcome of a decision.

Moreover, because Allied Plan assets were transferred to Armco to fund retirement benefits for the Group 1 and Group 2 Petitioners, awarding a duplicate pension from Allied would have depleted the *Allied Plan's* assets, not Allied's general funds.

Petitioners' attempts to bring this case within the scope of the *Bruch* opinion rest upon speculative factual assertions which are not part of the stipulated record and were not raised below. The Petitioners' unsupported claim that the Allied Plan Administrator had a "great financial interest" in resolving pension issues in connection with the sale of the Ashland Coke Plant, and their speculation that pension issues "could have been a stumbling block" to the sale, do not support the heightened scrutiny espoused by the Third Circuit in *Bruch*. Under Petitioners' theory, every corporate transaction which touched on an ERISA-covered plan would provide an occasion for *de novo* review of a plan administrator's denial of benefits, regardless of whether the employer stood to gain financially from the decision. The *Bruch* court's rationale for *de novo* review does not encompass such a speculative and generalized financial interest.

C. The Court of Appeals' Interpretation of Section 208 of ERISA is Not Contrary to the Decisions of Other Courts.

The holding of the Court of Appeals that the transfer of assets did not violate Section 208 of ERISA, 29 U.S.C. § 1058, presents no conflict warranting review.

In support of their contention that Section 208 was applicable because the 80-point pension was a nonforfeitable, accrued benefit, Petitioners cite *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985); *Hoover v. Cumberland, Maryland Teamsters Pension Fund*, 756 F.2d 977 (3d Cir. 1985); and *Shaw v. International Association of M. & A.W. Pension Plan,* 750 F.2d 1458 (9th Cir. 1985). None of these decisions involved the interpretation of Section 208; therefore, they do not present a conflict on the question of statutory interpretation before the Court of Appeals. Further, they present factual circumstances distinguishable from this case. *Amato* concerned a plan amendment resulting in partial termination of a pension plan under Section 4044 of ERISA; *Hoover* and *Shaw* involved the amendment of a plan's normal retirement benefit payable at normal retirement age. *See Amato,* 773 F.2d at 1416; *Hoover,* 756 F.2d at 982; *Shaw,* 750 F.2d at 1464.

In any event, the resolution of the applicability of Section 208 to the 80-point benefit was unnecessary to the decision below. The Court of Appeals assumed without deciding that Section 208 was applicable; it went on to find that the statutory language requiring equivalence of benefits was satisfied because the Petitioners were eligible to receive the same benefit immediately before and immediately after the sale. (Pet. App. 8a-9a). Petitioners attack these findings as "blatant factual oversights." (Pet. 15). The Court's findings are fully supported by the record, however, and Petitioners' claim of error is simply a repetition of their challenge to the findings of fact below. No conflict in decision is presented.

III. THE DECISION BELOW WAS WITHOUT ERROR.

There is no basis for the Court to grant certiorari because the decision below was manifestly correct.

The Court of Appeals' application of the arbitrary and capricious standard of review was consistent with precedent in the Sixth Circuit and with the overwhelming weight of authority from other courts of appeals. *See, e.g., Varhola v. Doe,* 820 F.2d 809, 812-13 (6th Cir. 1987); *Holland v. Burlington Industries, Inc.,* 772 F.2d 1140, 1149 (4th Cir. 1985), *aff'd sub nom. Brooks v. Burlington Industries, Inc.,* 477 U.S. 901 (1986); *Berg v. Board of Trustees, Local 705,* 725 F.2d 68, 70 (7th Cir. 1984). Because the Group 1 and 2 Petitioners alleged that the Allied Plan Administrator's failure to pay the 80-point benefit constituted a breach of fiduciary duties (Pet. 7), the Court's finding that the benefit denial was not arbitrary and capricious also disposed of the fiduciary claim.

The remaining claims were dismissed based upon the factual findings of the District Court. Rejection of the Section 208 claims rested upon undisputed facts that Group 1 and 2 Petitioners were entitled to identical retirement benefits immediately before and immediately after the transfer of assets. Group 3 Petitioners' claims that they were wrongfully induced to retire were found to be wholly at odds with uncontroverted facts that Allied did not misrepresent the provisions of the Armco Plan. The claimed unilateral amendment of the Allied Plan was also dismissed on factual grounds; rather than amending the Plan in any respect, the Court found that Allied's interpretation "merely gave substance and effect to existing provisions." (Pet. App. 8a).[6]

Finally, the question of the applicable statute of limitations raised by Petitioners was dismissed without discussion by the Court of Appeals. (Pet. 17). It was unnecessary for the Court to consider the issue because OCAW's claims of breach of a collective bargaining agreement were considered on their merits by the District Court and rejected. An issue which was unnecessary to the disposition of the case below and is not referenced in the opinion does not call for resolution by this Court.

It bears emphasis that no Petitioner lost any benefit to which he was entitled at the time of the sale of Allied's Ashland facility. Not only were all such benefits preserved, but Petitioners who went to work for Armco were presented with the opportunity to earn enhanced benefits. Petitioners, however, seek more than their entitlement. The Group 1 Petitioners demand an early retirement benefit for which they were never eligible, while Group 2 Petitioners demand from Allied a benefit which duplicates the pension to which they are entitled upon retirement from Armco. The Group 3 Petitioners, who demand back wages for jobs with Armco which they did not accept because they elected to retire, are receiving benefits under the Allied Plan and have no claim for additional benefits under either company's plan.

These facts present no questions meriting this Court's review.

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[6] Group 2 Petitioners claim in this Court that they were given the choice of employment with Armco or an immediate pension from Allied and that this *characterization* of their options amounted to a Plan amendment. (Pet. 8). The Court of Appeals specifically found to the contrary: "If the Group 2 plaintiffs wanted the 80-point pension, yet still wanted to work for Armco, they could have retired from Allied and then sought employment with Armco. Instead, they chose guaranteed employment with Armco . . . ." (Pet. App. 7a).

CONCLUSION

The petition for writ of certiorari should be denied.

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Dated: November 23, 1988

CERTIFICATE OF SERVICE

I, Christine H. Perdue, Counsel for the Respondents, Allied Chemical Hourly Employees' Pension Plan and Allied Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition for Respondents Allied Chemical Hourly Employees' Pension Plan and Allied Corporation in the United States Mail, first class postage prepaid, this 23rd day of November, 1988 addressed to: Donald J. Mares, Esq. McKendree, Toll & Mares, 1244 Grant Street, Denver, Colorado, 80203; John W. McKendree, General Counsel, Oil, Chemical and Atomic Workers International Union, P.O. Box 2812, Denver, Colorado, 80201; Bernard J. Casey, Esq., Reed, Smith, Shaw & McClay, 1150 Connecticut Avenue, N.W., Suite 900, Washington, D.C. 20036.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

ROWE, ET AL.,)
Plaintiffs,)
v.)
ALLIED CHEMICAL HOURLY)
EMPLOYEES' PENSION PLAN, ET AL.,)
Defendants.)

CIVIL ACTION NO. 83-282

OIL, CHEMICAL AND ATOMIC WORKERS)
INTERNATIONAL UNION, ET AL.,)
Plaintiffs,)
v.)
ALLIED CORPORATION, ET AL.,)
Defendants.)

CIVIL ACTION NO. 84-278

STIPULATIONS OF FACT

This stipulation is submitted in accordance with the Court's order of November 25, 1985.

Plaintiffs are divided into three groups. Group 1 consists of the so-called lay-off plaintiffs. Group 2 consists of the pre-sale 80-point plaintiffs. Group 3 consists of the Social Security option plaintiffs.

On December 23, 1985 plaintiffs filed with the Court a Motion to Amend Complaint and their proposed Amended Complaint. The proposed Amended Complaint contains a Count V-A which asserts for the first time claims on behalf of the Group 3 plaintiffs against the Armco defendants. The Armco defendants presently are studying the proposed Amended Complaint and are preparing an Opposition to the Motion to Amend which they expect to file by January 10, 1986 when it will be due under Local

Rule 7(c)(1). In the circumstances the Armco defendants do not stipulate that the record herein, including the instant stipulation, is sufficient to enable the court to dispose of the claims which Group 3 plaintiffs seek to assert against the Armco defendants in Count V-A of the proffered Amended Complaint.

Subject to the exception with respect to the claims of the Group 3 plaintiffs against the Armco defendants, it is the belief of the parties that as supplemented by these stipulations, the record including the interrogatory answers, admissions and depositions and affidavits previously filed in this case is sufficient to enable the Court to decide this matter on the defendant's Motion to Dismiss or for Summary Judgment and/or the Plaintiffs' Cross-Motion for Summary Judgment, now pending before the Court, without a trial. In accordance with the Court's Order, the parties will submit supplemental briefs on or before January 31, 1986. The parties have asked the Court for leave to submit briefs in response within 15 days after service of the supplemental briefs. The parties have also asked the Court to supplement its November 25 Order to allow a limited hearing to enable the Court to decide material issues, should there be issues of fact that cannot be stipulated.

For purposes of this matter only, the parties stipulate that the following facts are true:

A. BACKGROUND

1. This matter arises out of the sale by defendant Allied Corporation ("Allied") to defendant Armco Inc. ("Armco") of a coke-producing facility in Ashland, Kentucky. The terms of the sale are contained in a written agreement dated December 31, 1981, executed by appropriate officials of Allied and Armco ("the sales agreement"). The sales agreement contains certain provisions intended to govern pension benefits for former Allied coke plant employees hired by Armco. These provisions are incorporated in Sec. 2.05 of the sales agreement.

2. Until December 31, 1981, Allied owned and operated a coke-producing facility in Ashland, Kentucky. Hourly employees working for Allied at said facility were represented by Plaintiffs

Oil, Chemical and Atomic Workers International Union, AFL-CIO and its Local 3-523 ("OCAW").

3. During the years the OCAW represented Allied's hourly employees at the coke plant, their terms and conditions of employment were governed by successive collectively bargained agreements between Allied and the OCAW. The agreement in effect at the time of the sale was executed on August 5, 1979 and had an expiration date of May 14, 1982 ("the 1979 Agreement").

4. Pension benefits for Allied hourly employees at the coke facility, including the individual Plaintiffs, were governed by the Allied Chemical Corporation Hourly Employees' Pension Plan ("The Allied Plan"). As applied to the coke plant, the Allied Plan is a collectively bargained agreement whose terms were negotiated by the OCAW and Allied separately from the 1979 Agreement. The terms of the Allied Plan in effect at the time of sale became operative at the coke plant under a letter-agreement, dated May 12, 1981, executed by Allied and the OCAW. Under the letter agreement, the expiration date of the Plan at the coke plant is October 21, 1986.

5. Three provisions of the Allied Plan are involved in this litigation. Article IV(2)(a) describes eligibility requirements for what is commonly known as an "80-point" unreduced early retirement pension, as follows:

> An employee . . . may retire at his option, provided (a) his age and the number of years of his credited service with the Company, when added together, equal or exceed 80 . . .

Article IX(4)(a) describes the computation of credited service with Allied for the purposes of determining 80-point pension eligibility for employees who are laid off, as follows:

> If an employee is laid off for any reason within three years of the date that he would be eligible to retire under Article IV(2)(a) hereof, he will receive credit for the period of layoff from the effective date up to the date his age and years of credited service, including such period of layoff, equals 80.

Article VII provides for an optional method of leveling a pensioner's income throughout the retirement years by taking into account the pensioner's Social Security income (the so-called "Social Security" or "level income" option), as follows:

> An employee retiring under the provisions of Article IV(2a) or (2c) hereof before he first becomes eligible to receive Social Security payments may elect to receive an actuarially equivalent retirement income providing larger monthly payments, in lieu of the retirement income otherwise payable upon early retirement, until the date he first becomes eligible to receive Social Security payments; thereafter, his monthly payments shall be reduced by the approximate amount of his monthly Social Security benefit. Insofar as practical, therefore, a level total retirement income will be available for the pensioner.

6. At all times relevant hereto, defendant Armco has owned and operated a steel-making facility in Ashland, Kentucky, known as the Ashland Works. Hourly employees working for Armco at the Ashland Works are represented by the United Steelworkers of America ("USWA"). Those employees are participants in a pension plan negotiated between Armco and the USWA, the Armco Inc. Pension Agreement Plan ("the Armco Plan"). Armco and the Armco Plan are defendants in Case No. 84-278 only.

7. The Armco Plan did not contain provisions equivalent to the provisions of the Allied Plan quoted in paragraph 5, *supra.*

8. The actual sale of the Ashland coke facility by Allied to Armco was preceded by over a month of negotiations between Allied and Armco. One area of negotiation concerned pension benefits for hourly coke plant employees. Two options were considered. One option was for Allied and the Allied Plan to retain pension liability and related plan assets for benefits earned in Allied service by Allied employees, regardless of whether or not those employees went to work for Armco upon, or following, the sale. The other option was for Allied to transfer pension assets and liabilities to Armco for those Allied hourly coke plant employees who went to work for Armco.

9. During negotiations, Armco and Allied determined that the sales agreement would be written according to the second option, i.e., the liability to pay the benefit attributable to credited ser-

vice under Allied employment would be transferred to Armco and the Armco Plan together with assets to cover those liabilities for former Allied employees who went to work for Armco.

10. Pursuant to Section 2.05 of the December 31, 1981 sales agreement, Allied and Armco agreed to do the following with respect to the pensions of those Allied hourly coke plant employees who went to work for Armco on or after the sale without retiring from Allied service:

(a) Armco agreed to preserve and provide early retirement (including the 80-point) pension benefits under the Armco Plan for those employees eligible for early retirement under the terms of the Allied Plan as of the closing date of sale (i.e., December 31, 1981), as follows:

> Eligibility for commencement of the Allied pension plan benefit payable upon early retirement shall be preserved and provided under the respective Purchaser's plan for such persons as are eligible under the respective Allied plan on the Closing Date . . . (§ 2.05-(f)(iii))

(b) Allied agreed to transfer from its Plan to the Armco Plan funds equivalent to the actuarial present value on the respective "Payment Date" of the pension listed for each Allied employee hired by Armco ("the Transfer Value") (§ 2.05(c), (d));[1]

(c) Armco also agreed that former Allied hourly coke plant employees, following employment by Armco and the transfer of pension assets on their behalf, would be entitled to certain pensions, payable by the Armco Plan, as follows:

> (f) For each person for whom a Transfer Value is received:

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[1] The mechanism established by the sales agreement addressed not only the pensions for those employees hired by Armco immediately upon the sale but also the pensions for those employees who were on layoff from Allied at the time of the sale and who might be recalled by Armco within three years of the sale. The "Payment Date" would, therefore, vary according to the respective employee's date of hire by Armco.

(i) Service credited under the respective Allied pension plan for eligibility or vesting shall be credited for like purposes under Purchaser's respective plans;

(ii) The benefits to be provided under the Purchaser's respective plan shall be the greater of: (1) the benefits, if any, regularly provided under such plan based on service credited under the respective Allied plans plus service with Purchaser or (2) the pension shown in Item 8 of Exhibit R (reduced, if such pension begins before Normal Retirement Date, in accordance with the terms of the respective Allied Pension plan as of the Closing Date, based on eligibility for pension as of the Closing Date and age as of the date such pension begins) plus the benefit, if any, regularly provided under Purchaser's plans for service with Purchaser. (§ 2.05(f)(i), (ii)). [2]

11. Subsequent to the sale, funds were transferred according to section 2.05(c) of the sales agreement. The actual transfers were in two forms, direct plan-to-plan transfers and company-to-company transfers.

12. On March 31, 1982 the Allied Plan transferred $4,135,828 in pension reserves to the Armco Plan to fund pension benefits, including 80-point pension benefits, for those eligible employees who were hired by Armco as of the sale date.

13. In addition to the transfer of reserves from the Allied Plan to the Armco Plan, Allied paid Armco $1.051 million in cash to fund pension benefits, including 80 point pension benefits, for those eligible employees.

14. Thereafter, Allied made transfers from Plan to Plan and in direct cash payments every six months up to December 31, 1984 to fund benefits for those former Allied hourly employees recalled from layoff by Armco during each six-month period.

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[2] Exhibit R to the sales agreement was a list provided by Allied to Armco showing coke plant employees who were employed by Allied at the coke facility immediately prior to dates of sale or who were on leave or layoff from Allied with rights of return or recall as of the date of sale. Item 8 of Exhibit R specified, for each employee listed, the "[u]nreduced accrued monthly pension payable on Normal Retirement Date under the respective Allied pension plans."

15. The initial and the subsequent company-to-company transfers were negotiated amounts of cash intended to compensate for actuarial concerns, including, principally, concerns regarding 80-point pensioners, the risk of future wage increases credited to all years of Allied/Armco service, and the risk that employees would retire earlier than the assumed dates used to compute the Transfer Values.

16. The transfer value for each former Allied hourly employee hired by Armco was calculated by Allied and Armco actuaries to be 25.43234% greater than the value of the accrued benefits determined under PBGC regulations governing payment of premiums, 29 C.F.R. Part 2610. Plaintiffs do not stipulate that the calculation of the accrued value of benefits under 29 C.F.R. Part 2610 was correct.

17. In calculating the transfer value for each former Allied hourly employee, Allied's actuary made the following proposal, which Armco and Allied adopted:

> . . . it is our opinion that the amount of the payment from Allied's pension plans ought to be no more and no less than the value of the accrued benefits determined pursuant to Part 2610, Chapter XXVI, of Title 29 CFR, i.e., the value that the PBGC would assign for employer liability purposes were all accrued benefits guaranteed for PBGC purposes.
>
> We have determined that amount, for all the employees [salaried and hourly] [3] . . . based on the plans having a normal retirement age of age 65 and based on a December 31, 1981 plan termination date, to be $5,979,319. The portion of this related to the [hourly and salaried employees hired by Armco] is $5,372,273. Accordingly, $1,236,445 should be transferred from the Allied Salaried Pension Plan and $4,135,828 should be transferred from the Allied Hourly Pension Plan to the appropriate Armco plan. The portion of this amount for each employee is shown on the enclosed listing.

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[3] No claims are made in these consolidated actions on behalf of salaried employees.

> You have requested us to prepare a list of actuarial assumptions to support the aggregate Transfer Value of $7.5 million. This will require additional time. We believe the end product of such effort would be Transfer values which are fairly uniformly higher than the PBGC values. In the interest of time and efficiency, therefore, we respectfully propose that the Transfer Value for each Ashland employee be 125.43234% of the amount shown on the enclosed list.

18. All funds transferred, both plan-to-plan and company-to-company, were deposited into a master trust account in which funds are commingled for investment purposes with funds from other Armco pension plans.

19. On December 15, 1981, Armco and the USWA executed an agreement addressing several labor issues relative to the acquisition of the Allied coke facility.[4] Paragraph 6.3 and 6.4 of that agreement address pensions and provide in relevant part as follows:

> 6.3 Certain employees or surviving spouses of employees covered by this Memorandum have attained eligibility for or actual [pension] benefits from their previous labor agreements. Armco agrees to preserve those benefits so that any calculation under the Pension Agreement [i.e., the Armco Plan] would not result in those certain employees or surviving spouses of employees receiving a benefit less than they now receive or are entitled to receive. This preservation of existing benefits is not to be construed to permit any employee or surviving spouse of an employee to attain eligibility for such preserved benefits after Armco hires them or their spouses.

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[4] There is presently being litigated before the National Labor Relations Board a dispute, not relevant to this action, between OCAW and Armco concerning whether OCAW or the USWA should represent hourly employees at the coke facility for collective bargaining purposes following the sale. Until that dispute is finally resolved, Armco is recognizing the USWA as the collective bargaining representative of those employees.

> 6.4 Employees or surviving spouses receiving pensions under the conditions of this Memorandum may have the portion of their pensions earned under their previous labor agreement paid by their previous employer. Final determination of this procedure will be made prior to December 29, 1981.

This agreement was amended on November 3, 1983, but not with respect to pensions.

20. On January 15, 1982, the Benefits Plans Administrative Committee of the Armco Plan approved the pension provisions of the sales agreement and authorized the amendment of the appropriate Armco pension plans to conform to that agreement.

21. Preceding the sale of the coke plant, and extending from early to late December 1981, Allied and OCAW representatives met on a number of occasions. At these meetings, Allied and the OCAW discussed various aspects of the sale. Meetings were held with the plaintiffs' OCAW representatives by Allied on December 23, 1981 and by Armco on December 19, 1981. One purpose of these meetings was to describe pensions and other benefits for Allied employees who went to work for Armco.

22. At the meeting between Allied and OCAW representatives on December 23, 1981, Russell Hawkins, Vice President of Compensation and Employee Benefits, explained what pension benefits Allied hourly employees would be entitled to following the sale. Mr. Hawkins explained that Allied benefits would be "frozen" as of the date of sale, and on a flip chart or chalk board gave various examples showing how Allied and Armco pension credit would be integrated following the sale. No examples given by Mr. Hawkins specifically addressed the issue of how Art. IX(4)(a) would operate after the sale.

23. The OCAW is not a party to the sales agreement. The record does not reflect that Allied provided the OCAW or any plaintiff with a copy of the sales agreement prior to the sale. The record does not reflect that the OCAW or any plaintiff requested a copy of the sales agreement prior to the sale.

24. Before the plant sale, Allied's Ashland managers Gene Moore and Paul Harvey counseled or attempted to contact for

counseling every Allied employee who had attained or would attain 80 points by the sale date, including all those designated in this stipulation as plaintiffs in Groups 2 and 3.

25. Allied representatives informed all those counseled as follows:

a. On December 23, 1981 Gene Moore sent the following letter to those to be counseled:

> Dear Sir:
>
> Please be advised that the sale of the Ashland Plant assets is scheduled for 12/29/81. Due to the fact that you are currently eligible for an immediate pension, I want to make you aware that your earned benefits will be protected by Armco. However, the Armco plan does not provide for a Social Security Option.
>
> If you want to take your pension now and not go to work for Armco, please call me or Paul Harvey in the office or at home before returning to work on Dec. 28 so that we can discuss your situation.

b. At the counseling sessions, those counseled were told that the Allied 80-point pensions for which former Allied employees were eligible before the sale would be preserved by Armco for any such employee hired by Armco within three years following the sale, and would thereafter be payable upon retirement from Armco.

c. At the counseling sessions, those counseled were told that Armco did not have a Social Security option. They were told that if they wished to elect this option, they had to elect it prior to physically going to work for Armco. It was the understanding of Paul Harvey, an Allied representative who counseled the employees, that once an employee began working for Armco, the Social Security option was no longer available to him. It was also Harvey's understanding that an employee who did not retire from Allied, who went to work for Armco, and who then decided to retire from Armco, would not receive the social security option.

d. At the counseling sessions, each employee was given an estimate of what the Social Security option would be if he elected to take the option.

B. GROUP 1 PLAINTIFFS

26. The following Group 1 plaintiffs are former hourly employees of Allied's Ashland, Kentucky coke plant who were within three years of reaching 80 points at the time of the sale of the plant on December 31, 1981: Dan Abrams, Jr.; Fred L. Archey; Clarence Arrowood; Donald Ball; Robert L. Beloat; Charles W. Campbell; Earl Castle; Kenneth R. Coburn; Ted Cordle; Robert E. Damron; Charles C. Diamond; Eugene S. Duncan; Lancan J. Everman; Bob O. Foster; James C. Fuller, Jr.; Glenn Edward Gilbert; L. R. Greene; Charles E. Howard; Joseph M. Ketchesin; James H. Leake; Stanley Lee Leake; Charles J. Phillips; Robert L. Phillips; Jack G. Roark; Carl T. Robinson; Robert Rowe; A. W. Snoddy; Elmer Thompson; Jack C. Van Hoose; Nelson E. Walker; Bobby Gene Watts; Charles F. Wechsler; Allen J. Conley and William Simmons.

27. Group 1 plaintiff Wade F. Rigsby is a former hourly employee of Allied's Ashland, Kentucky coke plant who was not within three years of reaching 80 points at the time of the plant sale. Mr. Rigsby's birth date is 11/22/34 and his Allied employment date is 4/16/56.

28. Until the date of the sale, each plaintiff in Group 1 was employed by Allied at the coke plant.

29. Each plaintiff in Group 1 was offered and accepted employment with Armco as of the date of the sale.

30. Each plaintiff in Group 1 is presently employed by Armco at the coke plant.

31. Plaintiff Robert Rowe applied for an Allied 80-point pension under the provisions of Article IX(4)(a) of the Allied Plan in 1983.

32. Plaintiff Eugene Duncan applied for an Allied 80-point pension under the provisions of Article IX(4)(a) of the Allied Plan on March 3, 1983.

33. Allied denied the pension application of Messrs. Rowe and Duncan in a letter from Frank R. Saunders to Richard M. Bank dated November 18, 1983. It is attached hereto as Exhibit A.

34. The remaining Group 1 plaintiffs applied for an Allied 80-point pension under the provisions of Article IX (4)(a) of the Allied Plan on or about December 1, 1984.

35. Allied denied the pension application for each Group 1 plaintiff on or about February 1, 1985. A copy of the denial letter is attached hereto as Exhibit B.

36. On or about February 27, 1985, counsel for the Group 1 plaintiffs requested that Allied reconsider the denial of the pension claim. A copy of the letter is attached hereto as Exhibit C.

37. Allied reviewed the claim of the Group 1 plaintiffs and upheld the initial denial on or before December 31, 1985.[5] A copy of the letter is attached hereto as Exhibit D.

38. Allied representatives maintain that at one or more meetings with the OCAW, Allied informed the OCAW that it did not consider that termination of Allied hourly coke plant employees as a result of the sale constituted a layoff. OCAW representatives maintain that the layoff issue was not discussed. The parties' notes reflect that the only Group 1 plaintiff present during such meetings was Ted Cordle.

39. Section 2.05(b), of the Sales Agreement, footnote to Item 8, provides that the unreduced accrued monthly pension payable on Normal Retirement Date under the Allied Plan

> shall be and be deemed to be automatically adjusted to reflect any increase accrued after the Closing Date by any person on layoff as of the Closing Date and recalled therefrom after the Closing Date in accordance with the applicable terms of the . . . [Allied Plan] and each reference to Item 8 of Exhibit R in the Agreement shall mean and refer to such adjusted amount whenever appropriate.

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[5] Allied's letters upholding denial of the claims of Group 1 plaintiffs were held up between September 11, 1985 and the present by agreement of counsel, pending outcome of settlement discussions.

Under this provision, Allied employees on layoff as of the date of sale continued to accrue service credit under the Allied Plan, until the date of hire by Armco, up to December 31, 1984.

40. None of the Group 1 plaintiffs has applied to Armco for a pension.

41. None of the Group 1 plaintiffs has filed a grievance with Allied under Article VI of the 1979 labor agreement on the issue of whether he was laid off from Allied employment by virtue of the sale.

42. The OCAW has not filed a grievance with Allied under Article VI of the 1979 labor agreement on the issue of whether Group 1 plaintiffs were laid off from Allied by virtue of the sale.

C. GROUP 2 PLAINTIFFS

43. Group 2 plaintiffs are the following former hourly employees of Allied's Ashland, Kentucky coke plant who were eligible for 80 - point pensions at the time of the sale of the plant on December 31, 1981: John L. Barber; Ishmael R. Brewer; Charles E. Church; Claude Dennison; John D. Griswold; James A. Hayes; Charles Norman King; James C. Kretzer; Everett Lemaster; Kenneth E. Leibee; Mitchell McCalvin; Paul C. Preston; Paul B. Price; Ersel Salyers; Byron Steel, Jr.; Robert L. Thornbury; George E. Walton, Jr.; Clifford Brickey; Clifford Eaton; Gene Gabbard; Jesse Hill; John C. Hite; Everett Kiser; George Lester; Herman McKenzie; Donald Richardson; Carl Stapleton; and Chester Watson.

44. Until the date of the sale, each plaintiff in Group 2 was employed by Allied at the coke plant.

45. Each of the plaintiffs in Group 2 was offered and accepted employment with Armco as of the date of the plant sale.

46. No Group 2 plaintiff applied to Allied for an 80-point pension under the terms of Article IV(2)(a) of the Allied Plan as of December 31, 1981. Each Group 2 plaintiff applied for such pension on or about December 1, 1984.

47. Allied denied the pension application for each Group 2 plaintiff, on or about January 31, 1985. A copy of the denial letter is attached as Exhibit E.

48. Counsel for the Group 2 plaintiffs requested that Allied reconsider the denial of the pension claim. A copy of the letter is attached hereto as Exhibit C.

49. Allied reviewed the claim of the plaintiffs in Group 2 and upheld the initial denial on or before December 31, 1985.[6] A copy of the letter is attached hereto as Exhibit F.

50. As Armco interprets its obligations under the Armco Plan and Section 2.05 of the Sales Agreement, if any Group 2 plaintiff applied for the 80-point pension preserved by Armco under Section 2.05(f)(iii) of the Sales Agreement, he could not receive this pension without retiring from Armco.

51. Group 2 plaintiff Byron Steele, Jr. applied for and received an 80-point retirement benefit and the Social Security leveling option from Armco, effective March 31, 1985.

52. Group 2 plaintiff Gene Gabbard applied for and received an 80-point retirement benefit and the Social Security leveling option from Armco, effective May 31, 1985.

53. Group 2 plaintiff Donald Richardson applied for and received an 80-point retirement benefit and the Social Security leveling option from Armco, effective April 30, 1985.

54. Group 2 plaintiff Chester A. Watson applied for and received a 30-year retirement benefit from Armco, effective September 31, 1985.

55. Group 2 plaintiff Everett Kiser applied for and received a 30-year retirement benefit from Armco, effective April 30, 1985.

56. Group 2 plaintiff Clifford Brickey applied for and received a 30-year retirement benefit from Armco, effective January 31, 1985.

57. The remaining Group 2 plaintiffs have not applied for a retirement benefit from Armco.

D. GROUP 3 PLAINTIFFS

58. Group 3 plaintiffs are the following former hourly employees of Allied's Ashland, Kentucky coke facility who were

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[6] Allied's letters upholding denial of the claims of Group 2 plaintiffs were held up between September 11, 1985 and the present by agreement of counsel, pending outcome of settlement discussions.

eligible for 80-point pensions at the time of the sale of the coke facility on December 31, 1981, and who retired from Allied employment on or about that date: Hank C. Conley, Herman Conley, Ralph Fain, Robert L. Garlock, Allen Hogue, Jr., Willy Hughes, Estill V. Martin, Hubert Neace, Floyd M. Penix, James L. Porter, James O. Potter, Curtis E. Puckett, Sheridan E. Sprague, James E. Stambough, Earl Wheeler and James N. Yates.

59. Group 3 plaintiff J. Bowling was not eligible for the Social Security option at the time he retired from Allied employment because he was over age 62.

60. Article VII of the Allied Plan contains a Social Security leveling option, which is available to an employee who takes early retirement under Article IV(2)(a) of the Plan. *See* Background ¶ 5 *supra*.

61. An employee who elects the Social Security leveling option receives pension benefits equal to the amount of his anticipated Social Security benefit plus the pension benefit he would receive when he became eligible for a Social Security benefit; once he becomes eligible for Social Security payments, his pension benefits are reduced by the amount of Social Security received, providing a level income throughout the retirement years.

62. Armco's Pension Plan in effect at the time of the sale of the coke facility did not contain a Social Security leveling option.

63. The Armco management team which negotiated the personnel aspects of the purchase of the coke facility, including pension provisions, consisted of James H. Wallace, Corporate Director of Industrial Relations, assisted by A. C. Worrell, Manager of Employee Benefits, R. L. Mandera, Manager of Employee Benefits Accounting and R. D. Brown, Associate Counsel. Mr. Brown's area of expertise is ERISA, and his responsibilities include advising the Armco pension plans and acting as their legal counsel.

64. Wallace was in charge of this team. Mr. Wallace was responsible for the personnel aspects of the sale of Allied's Ashland plant to Armco, including integration of former Allied employees into the Armco work force and negotiating pension provisions that would apply to the former Allied employees following the sale.

65. On December 1, 1981 at a meeting in Huntington, W.Va., involving Armco and Allied benefits representatives, Armco representatives A. C. Worrell and R. D. Brown advised the Allied representatives that the Armco Pension Plan contained no Social Security leveling option and that, at that time, they did not wish to see such a provision in the Armco Plan because of the difficulty of administering such a provision. Mr. Worrell believes he was "firm in my position that I didn't want to see that [Social Security option provision] carried into the Armco plan" at the Huntington meeting.

66. Neither Worrell nor Brown had reason to believe that his statement at the December 1 meeting respecting the Social Security leveling option was inaccurate.

67. Further discussions were held among Allied and Armco benefits personnel in Middletown, Ohio on December 10, 1981.

68. It is the recollection of R. W. Hawkins that the Social Security leveling option was discussed at the Middletown meeting and that he was advised by Mr. Worrell that Armco did not intend to provide such an option.

69. Mr. Worrell considered that it was Armco's policy not to provide a Social Security option until he learned the contrary sometime in November 1982, when he saw a letter from J. E. Smith, Armco Senior Attorney for Industrial Relations, to Richard Bank dated November 15, 1982. Accordingly, at no time did Mr. Worrell advise any Allied representative that Armco would provide a Social Security leveling option.

70. Mr. Brown was unaware of any Armco policy on provision of a Social Security option following the sale, until he saw the November 15, 1982 letter from J. E. Smith to Richard M. Bank.

71. The Social Security leveling option does not add to the actuarial cost of a pension benefit.

72. To Mr. Brown's knowledge, the Social Security option was never discussed with Armco's Benefit Plans Administrative Committee (BPAC).

73. A memorandum dated December 18, 1981 from Richard T. Allen, Supervisor of Labor Relations at Armco's Ashland Works to J. Edward Maddox, Manager of Human Resources, Ashland Works, states that "Jim Wallace called . . . They [Allied] want

us to pick up their Social Security offset provision but Jim says we are not going to do it since we don't have a similar provision." Wallace has no recollection of this conversation with Allen but does not deny that it occurred.

74. During negotiations for the sale of the coke facility, James Kempf of Allied also advised Mr. Wallace of the existence of the Social Security option and its popularity with Allied employees.

75. On December 21, 1981, J. E. Smith left a telephone message for J. E. Maddox advising that "Allied employees will not have Social Security leveling option available after going to work for Armco."

76. Mr. Smith, who is no longer employed by Armco, did not have the authority to make such a commitment and the record does not disclose what authority, if any, Mr. Smith relied upon in leaving the telephone message.

77. An unsigned Armco memorandum of December 22, 1981, also states that Armco did not intend to provide the Social Security option.

78. The record does not reflect whether or not Wallace ever advised any Allied representative that Armco would provide the Social Security option.

79. At a meeting with the OCAW on December 23, 1981, Mr. Hawkins of Allied detailed the pension aspects of the sale and advised the OCAW representatives that the Social Security option would not be available under the Armco Plan.

80. R. T. Allen of Armco attended the meeting on December 23, 1981 to assure that representations made were accurate.

81. At no time did Mr. Allen take any position contrary to that expressed by Mr. Hawkins in the meeting.

82. Prior to the sale Allied sent certified letters to all employees eligible for early retirement advising them that the Armco Plan contained no Social Security option. *See* background ¶ 25(a) *supra*.

83. Allied individually counseled employees eligible for early retirement that the Social Security option would not be available with Armco.

84. Larry Riel, Director of Employment Benefits at Armco's Ashland Works, was responsible for giving out benefit information at the Ashland plant but was given no instructions on the Social Security option directly from Mr. Wallace or Mr. Worrell.

85. On November 4, 1982, Richard Bank, attorney for John Griswold, addressed a letter to Mr. Riel demanding on behalf of Mr. Griswold, an employee of Armco and a former employee of Allied at the coke facility, that Griswold be permitted to exercise the Social Security leveling option.

86. Mr. Bank also contacted Robert Sand, Allied's Assistant General Counsel. Mr. Bank stated that Griswold claimed entitlement to the Social Security option because he earned it before sale of the coke plant, and that he would take whatever action against Allied would be necessary to vindicate the rights of Mr. Griswold if he were denied the Social Security option.

87. Mr. Sand agreed to contact Armco to discuss whether the Social Security option was payable to Mr. Griswold.

88. Mr. Sand then contacted Mr. Brown of Armco in an attempt to resolve the controversy over Mr. Griswold's right to the Social Security option.

89. At approximately the same time as Griswold's counsel contacted Mr. Sand, he also contacted Armco's corporate headquarters in Middletown, Ohio asserting Mr. Griswold's claim of entitlement to the Social Security option.

90. Sometime during the week and a half following Mr. Bank's November 4, 1982 letter to Mr. Riel, the matter of Mr. Griswold's request came to the attention of Mr. Wallace, who determined that Griswold was entitled to exercise the Social Security option in the light of Armco's commitment in both the sales agreement and the December 15, 1981 Armco/USWA Memorandum [of Understanding] to preserve those pension benefits for which former Allied employees were eligible at the time of the sale. Mr. Wallace's decision was incorporated into the November 15, 1982 letter from J. E. Smith to Richard M. Bank. *See* ¶¶ 69, 70 *supra*.

91. At no time prior to the sale did any Armco representative advise Allied that Armco would provide the Social Security option.

92. According to Mr. Wallace, the first time Armco's Ashland personnel were advised that the Social Security option would be made available was after the Griswold inquiry in the fall of 1982.

93. Armco did not request advice from its actuary on how Social Security option payments should be calculated until January, 1983.

Respectfully submitted,

Counsel for Plaintiffs

/s/ by Victoria L. Block
Richard M. Bank, Esquire
1325 18th Street, N.W., Suite 103
The Palladium
Washington, D.C. 20036

Victoria Block, Esquire
200 Home Federal Building
Ashland, KY 41101

Counsel for Allied Defendants

/s/ Christine H. Perdue
Christine H. Perdue, Esquire
Hunton & Williams
707 E. Main
P.O. Box 1535
Richmond, VA 23212

Wendell S. Roberts, Esquire
Gray, Woods & Cooper
P.O. Box 70
Ashland, KY 41101

Counsel for Armco Defendants

/s/ by Gregory L. Monge
Jerome Powell, Esquire
Reed, Smith, Shaw & McClay
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

William Jones, Esquire
Van Antwerp, Hughes, Monge &
Jones
1416 Winchester Avenue
Ashland, KY 41101

Exhibit A

Allied Corporation
Law Department
P.O. Box 2245R
Morristown, New Jersey 07960

November 18, 1983

Richard M. Bank, Esq.
1325 18th Street, N.W. Suite 103
Washington, DC 20036

Re: *Eugene Duncan and Robert Rowe*

Dear Mr. Bank:

This letter responds to your recent letters of September 13, 1983 and October 21, 1983 requesting pension eligibility for the above-referenced individuals under Article IV(2)(a) of the Allied Corporation Hourly Employees' Pension Plan. As explained below, neither Mr. Duncan nor Mr. Rowe is an "employee" so as to be eligible for benefits under the Plan. As a result, the applications for retirement must necessarily be denied.

Background

Both applicants were employees of Allied Corporation at its facility located in Ashland, Kentucky. This facility, as you know, was transferred to Armco in late December, 1981. Incident to the sale, the pension eligibility of participants in the Plan was transferred to a plan of the succeeding employer. As of the date of transfer, persons who had been participants in the Plan ceased their participation therein and became participants in the applicable plan of the succeeding employer. Service with Allied was recognized as credited service under the plan of the succeeding employer.

Pension Eligibility

As of the date of transfer, neither Mr. Duncan nor Mr. Rowe had applied for retirement. Neither had accumulated sufficient service to qualify for a pension under Section IV(2)(a) of the Plan.

Effect of Article IX(4)(a)

Article IX(4)(a) of the Plan, referenced by you states:

> "In the event of a layoff [the employee will receive credit for the layoff.]"

No layoff was involved in the above-referenced transfer. Employees who were hired by the purchaser continued to be comparably compensated and continued to work. By virtue of the transfer of funds from the Plan to the appropriate plan of the successor employer, each employee was assured the actuarial equivalent of the value of their benefits immediately preceeding the transfer.

Article IX(4)(a) is inapplicable.

Appeal Rights

Article XII of the Plan sets forth the Appeals Procedure. It is supplemented by Section 503 of the Employee Retirement Income Security Act (ERISA - 29 USC 1133). Neither Article XII nor Section 503 permits a nonparticipant in the Plan to appeal a denial of benefits on the grounds of nonparticipation. Neither Mr.Rowe nor Mr. Duncan is a participant in or beneficiary of the Plan.

CONCLUSION

Notwithstanding the nonparticipant status of Messrs. Duncan and Rowe, Allied has set forth above the specific reason for denial of their claim; i.e., why neither claimant is entitled to benefits from the Plan. Further, Allied does not agree that claimants' assertions are subject to arbitration or any other form of appellate requirement since neither claimant is an employee of the Company or a participant in the Plan.

Allied would again suggest that any claim for a retirement benefit be directed to the present employer of the claimants.

Very truly yours,
/s/ Frank R. Saunders
Frank R. Saunders

bcc: Messrs. Sanderson
Snethen
Brown

Exhibit B

Allied Corporation
P.O.Box 2245R
Morristown, NJ 07960-2245

February 1, 1985

Reference: *Allied Chemical Hourly Employees' Pension Plan*

Dear Sir:

This is to acknowledge your recent letter in which you claim benefits under the Allied Chemical Hourly Employees' Pension Plan. As you no doubt know, Allied has also been served with a complaint in federal court in Kentucky demanding the same benefits. Allied has denied the claim in that lawsuit.

It is similarly our decision to deny the claim made in your letter. There are a number of reasons for this decision. They include the following:

1. Pursuant to our negotiations with OCAW and Armco in 1981 in connection with Armco's purchase of Allied Corporation's Ashland, Kentucky coke plant, the obligation to pay your Plan benefit was assumed by Armco, Inc. (Armco) and the Armco Inc. Pension Agreement Plan (the Armco Plan). The assets required to fund that benefit were transferred from the Allied Plan to the Armco Plan. This action was taken in accordance with Section 3 of Article XV of the Allied Plan. Accordingly, you no longer have an interest and you are no longer a participant in the Allied Plan. Any claim you may have for a pension benefit should be addressed to Armco.
2. In any event you are not entitled to an "80 point pension" because, as of December 31, 1981, you were not laid off from Allied Corporation's employ. See Section 4 of Article IX.
3. Neither Allied Corporation nor the Plan can advise you whether you must retire from Armco's employ to receive a benefit under the Armco Plan.

> You should contact representatives of Armco or the Armco Plan in connection with that question.

You or your authorized representative may request Mr. R.W. Hawkins to review this decision. A request for review must be submitted in writing and must be filed within sixty days of your receipt of this letter. In addition, you or your authorized representative may review any pertinent documents and submit issues and comments in writing to Mr. Hawkins for his consideration.

A decision on review normally will be made within sixty days after the date that your request for review is filed. It may be necessary to extend that period, by up to an additional 60 days, in certain cases. If an extension is required, you will be notified of that action.

Sincerely yours,
/s/ J.P. Snethen, Manager
J.P. Snethen, Manager
Employee Benefits

JPS/sp

cc: Richard M. Bank Esquire

Exhibit C

Richard M. Bank
Attorney At Law
1325 18th Street, N.W.
Suite 103
Washington, D.C. 20036
(202) 466-8282

February 27, 1985

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. J.P. Snethen, Manager
Employee Benefits
Allied Corporation
P.O.Box 2245R
Morristown, NJ 07960-2245

Re: *Pension Denial Letters to Plaintiffs in OCAW, et al v. Allied, et al.*

Dear Mr. Snethen:

I have been advised that you have sent pension denial letters to some or all of the individual plaintiffs I represent in *OCAW, et al. v. Allied, et all.* While these denial letters apparently reflect that copies have been sent to me, I have received no copies from Allied. At this point, I do not know precisely to whom such letters were sent, and I request that you immediately supply me with copies of all denial letters sent to plaintiffs in *OCAW v. Allied*.

In the interim, as authorized representative of the plaintiffs, I also request that Mr.R.W. Hawkins review the initial denial of benefits to each such plaintiff, as offered in the denial letters. Finally, I request that you inform me what issues, if any, Allied considers arbitrable should Mr. Hawkins uphold initial benefit denials.

After reviewing all of the denial letters, I will be in further contact with you.

Sincerely,
/s/ Richard M. Bank
Richard M. Bank

cc: Christine Perdue

EXHIBIT D

[DATE]

[Name]
[2nd line of address]
[3rd line of address]
[City, State]

RE: *Request for Review of Denial of Claim Under*
Allied Chemical Hourly Employees' Pension Plan

Dear Sir:

Mr. Richard M. Bank has appealed on your behalf the denial of your application for early retirement benefits under the Allied Chemical Hourly Employee's Pension Plan. After reviewing the initial decision, I have determined that the denial of benefits was proper for the reasons stated in Mr. Snethen's letter of February 1, 1985.

As you are neither an employee nor a retiree under the Allied Plan, and you have not raised an issue subject to the Appeals Procedure of Article XII of the Plan, this response will conclude consideration of your claim under the Allied Plan. Should you have any additional facts you believe to be pertinent to your claim, you may submit them to me or to Mr. Snethen along with a request for reconsideration.

Sincerely yours,

Russell W. Hawkins
Staff Vice President
Compensation and Employee
Benefits

132/6060

cc: Richard M. Bank, Esquire

Exhibit E

Allied Corporation
P.O. Box 2245R
Morristown, NJ 07960-2245

January 31, 1985

Reference: *Allied Chemical Hourly Employees' Pension Plan*

Dear Sir:

This is to acknowledge your recent letter in which you claim benefits under the Allied Chemical Hourly Employees' Pension Plan. As you no doubt know, Allied has also been served with a complaint in federal court in Kentucky demanding the same benefits. Allied has denied the claim in that lawsuit.

It is similarly our decision to deny the claim made in your letter. There are a number of reasons for this decision. They include the following:

1. Pursuant to our negotiations with OCAW and Armco in 1981 in connection with Armco's purchase of Allied Corporation's Ashland, Kentucky coke plant, the obligation to pay your Plan benefit was assumed by Armco, Inc. (Armco) and the Armco Inc. Pension Agreement Plan (the Armco Plan). The assets required to fund that benefit were transferred from the Allied Plan to the Armco Plan. This action was taken in accordance with Section 3 of Article XV of the Allied Plan. Accordingly, you no longer have an interest and you are no longer a participant in the Applied Plan. Any claim you may have for a pension benefit should be addressed to Armco.
2. You did not elect to retire from Allied while you were still an Allied employee and participant in the Plan, nor did you elect to receive a deferred benefit. When the assets necessary to fund your benefit were transferred to Armco, your entitlement to an 80 point pension was preserved. You were also provided with the opportunity to accrue further service credit which would enhance your

pension benefit. For these reasons, you are neither retired from Allied nor in a vested deferred benefit status under the Allied Plan.

3. Neither Allied Corporation nor the Plan can advise you whether you must retire from Armco's employ to receive a benefit under the Armco Plan. You should contact representatives of Armco or the Armco Plan in connection with that question.

You or your authorized representative may request Mr.R.W. Hawkins to review this decision. A request for review must be submitted in writing and must be filed within sixty days of your receipt of this letter. In addition, you or your authorized representative may review any pertinent documents and submit issues and comments in writing to Mr. Hawkins for his consideration.

A decision on review normally will be made within sixty days after the date that your request for review is filed. It may be necessary to extend that period, by up to an additional 60 days, in certain cases. If an extension is required, you will be notified of that action.

Sincerely yours,

J.P. Snethen, Manager
Employee Benefits

JPS/sp

cc: Richard M. Bank, Esquire

EXHIBIT F

[DATE]

[Name]
[2nd line of address]
[3rd line of address]
[City, State]

RE: *Request for Review of Denial of Claim Under*
Allied Chemical Hourly Employees' Pension Plan

Dear Sir:

Mr. Richard M. Bank has appealed on your behalf the denial of your application for early retirement benefits under the Allied Chemical Hourly Employees' Pension Plan. After reviewing the initial decision, I have determined that the denial of benefits was proper for the reasons stated in Mr. Snethen's letter of January 31, 1985.

As you are neither an employee nor a retiree under the Allied Plan, and you have not raised an issue subject to the Appeals Procedure of Article XII of the Plan, this response will conclude consideration of your claim under the Allied Plan. Should you have any additional facts you believe to be pertinent to your claim, you may submit them to me or to Mr. Snethen along with a request for reconsideration.

Sincerely yours,

Russell W. Hawkins
Staff Vice President
Compensation and Employee
Benefits

132/6060

cc: Richard M. Bank, Esquire